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ABSTRACT

The almost universal doctrine of charitable immunity was traditionally justified at one time because of the altruistic nature of charities. The reasons for abolition of charitable immunity in most states have generally been two-fold: (1) charities are no longer low-budget, marginal operations; (2) the risk of crippling verdicts can be minimized and controlled through the purchase of liability insurance. This book presents pertinent case information about the legal problems encountered by religious and private schools in the United States. Six chapters cover the following topics in detail: (1) tort liability (charitable immunity, field trips, invasion of privacy); (2) constitutional and contractual considerations of institutional, student, and faculty relationships; (3) governing board responsibilities and liability (fiduciary relationship, standard of care; closing a school); (4) governmental regulation of nonpublic schools (basis for state regulation; schools with and without a religious nexus); (5) federal antidiscrimination legislation (general corrective statutes, Equal Pay Act of 1964, Family and Medical Leave Act of 1993); and (6) special problems (copyright, Immigration and Reform Control Act, bankruptcy code and student debts). A table of cases and an index are included. (LMI)

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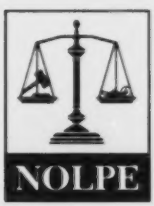
Ralph D. Mawdsley

Third Edition



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Dedication

This book is dedicated to my wife, Alice, whose intellectual and emotional strength has sustained me over these many years, and to our two sons, Jonathan and James, themselves graduates of both religious and private schools.

About the Author

Ralph D. Mawdsley is Professor and Chair, Department of Counseling, Administration, Supervision and Adult Learning, Cleveland State University. Prior to accepting this position, he spent twelve years at Liberty University serving as Professor of Education law, Administrative Counsel, and Vice President of Human Resources. His education includes twelve years as a teacher and administrator at a religious nonpublic school in Minneapolis, Minnesota, where he also served as Adjunct Professor at the University of Minnesota. In addition to his Ph.D. from the University of Minnesota, Dr. Mawdsley earned his J.D. from the University of Illinois.

He has published widely on topics pertaining to all levels of education and currently has over 150 publications to his credit, including nine books. Among his publications are several other NOLPE monographs, including *Academic Misconduct: Cheating and Plagiarism*, *Pupil Transportation and the Law*, *Legal Aspects of Plagiarism*, *Free Expression and Censorship: Public Policy and the Law*, two earlier editions of *Legal Problems of Religious and Private Schools*, as well as chapters for two different NOLPE *Case Citation Series*. He has served NOLPE on the program, publications, and membership committees, as well as on the Board of Directors. He is Commentaries Editor for the journal, *Religion and Public Education*, and a member of West's *Education Law Reporter* Editorial Advisory Committee.

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CHAPTER I

TORT LIABILITY

Charitable Immunity

The almost universal doctrine of charitable immunity was traditionally justified at one time because of the altruistic nature of the activities of charities and because the imposition of liability would be unfair when the organization received no benefit from its works.[1] However, the trend since World War II in most states has been the total or partial abrogation of charitable immunity.[2] Charitable immunity protected not only groups rendering charity but nonprofit service organizations generally, such as hospitals, churches, schools, and colleges. The reasons for abolition of charitable immunity in most states have generally been two-fold: (1) charities are no longer low-budget, marginal operations but are significant operations with large numbers of employees;[3] (2) the risk of crippling verdicts can be minimized and controlled through the purchase of liability insurance.[4]

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[1] *E.g.*, see Cox v. DeJarnette, 123 S.E.2d 16, 22 (Ga. Ct. App. 1961) (immunity has purpose of preserving "eleemosynary funds so as to enable the charity to carry out its beneficent purposes"). See *The Quality of Mercy, "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1383-84 (1987); Canon and Jarvis, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 973 (1979). See *also* RESTATEMENT (SECOND) OF TORTS § 895 E comment c (1965); G.G. AND G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS, 469 (5th ed. 1973).

[2] See Annotation, *Tort Immunity and Nongovernmental Charities-Modern States*, 25 A.L.R.4th 517, 522-615 (1983) (at least 16 jurisdictions have abrogated charitable immunity for all kinds of charitable institutions; 12 have abrogated immunity for charitable institutions like hospitals; and 5 have abrogated immunity for charitable institutions other than hospitals; 6 states maintain partial immunity for all kinds of charities; 10 maintain partial immunity only for institutions like hospitals; and 2 maintain partial immunity for institutions other than hospitals). See *also* The Quality of Mercy, *supra note* 1 at 1385.

[3] Foster v. Roman Catholic Diocese of Vt., 70 A.2d 230 (Vt. 1950); Adkins v. St. Francis Hosp., 143 S.E.2d 154 (W. Va. 1965); Parker v. Port Huron Hosp., 105 N.W. 2d 1 (Mich. 1960). See Barr v. United Methodist Church, 153 Cal. Rptr. 322, 331 (Cal. Ct. App. 1979) where the "business" of a charity in operating retirement homes was described as not only fulfilling "spiritual concerns" but was also identified as "commercial activities" requiring "primarily business decisions." See *also*, Albritton v. Neighborhood Centers Ass'n for Child Development, 466 N.E.2d 867, 870-71 (Ohio 1984) ("a policy exempting a charitable organization from having to compensate for harm caused by it is equivalent to requiring an injured individual to make an unwilling contribution to that organization in the amount which would be due him had he been injured by a non-charitable entity. Such coerced donations are inimical to the whole concept of charitable donations and service.").

[4] Rakevic v. Croatian Cultural Club, 430 N.Y.S.2d 829, 837-38 (N.Y. App. Div. 1980); Mississippi Baptist Hosp. v. Holmes, 33 So. 2d 142 (Miss. 1951); Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965); Myers v. Drozda, 141 N.W.2d 852 (Neb. 1966). See Kornhauser, *An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982).

Regardless of any statute conferring partial or complete immunity,[5] courts have tended to consider the doctrine of charitable immunity as a judicial creation and thus subject to abolition by state courts when persuaded that public policy would demand such abolition.[6]

Notwithstanding the existence of a viable defense of charitable immunity in a state in the past, courts have demonstrated great imagination in circumventing the defense to find assets to satisfy a tort judgment, namely, waiver of exemption,[7] a business enterprise beyond the statutory nonprofit purposes,[8] property held by the charitable institution but subject to property taxes[9] and liability to the extent of liability insurance coverage.[10] The abiding lesson from a study of the erosion and abolition of charitable immunity is that the doctrine can be suddenly invalidated with potentially disastrous results for the charitable institution. It is thus no surprise to find courts encouraging the purchase of liability insurance.[11]

In today's litigious society it is probably advisable for a nonpublic school to have its own liability coverage, or to be covered under an umbrella policy of a parent organization. The amount of coverage should not be determined in a casual and off-hand manner, but should reflect each organization's risk factors, such as: the age group serviced; total number of students; size of facilities and state of their repair; nature of high risk activities; kind of punishments used, especially corporal punishment; number of related nonprofit organizations of similar purpose or mission;[12] and the extent of student medical coverage.[13]

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[5] See English v. New England Medical Ctr., 541 N.E.2d 329 (Mass. 1989) (statute limiting liability for charitable institutions to $20,000 in case where jury award had been $350,000 upheld over right to jury trial, equal protection, and substantive due process objections); Cotton v. Catholic Bishop, 351 N.E.2d 247 (Ill. App. Ct. 1976); Helgendorf v. First Baptist Church of Danville, 510 N.E.2d 659 (Ill. App. Ct. 1987) (in loco parentis statute interpreted as removing public school teachers from liability for ordinary negligence in "discipline and conduct of the schools" applied also to parochial schools and day care personnel).

[6] Hungerford v. Portland Sanitarium and Benevolent Ass'n, 384 P.2d 1009 (Or. 1963); Pierce v. Yakima Valley Memorial Hosp. Ass'n, 260 P.2d 765 (Wash. 1953); Roman Catholic Church v. Kennan, 243 P.2d 455 (Ariz. 1955).

[7] Brown v. City of Pittsburgh, 186 A.2d 399 (Pa. 1962).

[8] Kasten v. YMCA, 412 A.2d 1346 (N.J. Super. Ct. App. Div. 1980); Kirby v. Columbian Inst., 243 A.2d 853 (N.J. Super. Ct. App. Div. 1968).

[9] Mack v. Big Bethel A.M.E. Church, 188 S.E.2d 915 (Ga. Ct. App. 1972); Baptist Memorial Hosp. v. Coullens, 140 S.W.2d 1088 (Tenn. 1940).

[10] Fairall v. Sisters of the Third Order of St. Francis, 198 N.E.2d 15 (Ill. App. Ct. 1962); Cox v. De Jarnette, 123 S.E.2d 16 (Ga. Ct. App. 1961). In an interesting conflict of laws case, a federal appeals court has affirmed the reduction from $135,000 to $20,000 the judgment against a religious association because a Massachusetts statute provides that charitable institutions tort liability "shall not exceed the sum of twenty thousand dollars." Mason v. Southern New England Conference Ass'n of Seventh-Day Adventists, 696 F.2d 135 (1st Cir. 1982); MASS. GEN. LAWS ANN. ch. 231, § 85K (1985). *See also English*, *supra* note 5.

[11] Ricker v. Northeastern Univ., 279 N.E.2d 671 (Mass. 1972); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978).

[12] Under the concept of ascending liability, the tortious acts of one organization, e.g., a school, can be imputed to a related organization with a similar mission, e.g., a church, even though both are incorporated separately. *See* E. GAFFNEY, JR. AND P. SORENSON, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (1984).

School liability coverage should be a careful collaborative effort by the school's administration, the school's attorney and an insurance agent.

Exculpatory Clauses

The responsibilities of educational institutions for the general safety of, and injuries to, students in their school depends upon legal theories involving intentional or negligent conduct. The legal theory pursued determines the elements necessary to sustain the burden of producing evidence to avoid dismissal of a complaint or summary judgment for defendant school and school personnel.[14] With the exception of the doctrine of sovereign immunity which totally or partially prohibits a state being sued in its own state courts,[15] the legal duties expected of, and defenses available to, public schools will generally be equally applicable to nonpublic schools. The contractual nature of nonpublic education lends itself to efforts to reduce or eliminate duties of care, and hence, liability for subsequent injury. Such efforts to limit or eliminate (exculpate) liability by one-time releases, hold

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[13] Unlike liability insurance, medical insurance coverage is keyed to status, not fault. Although parents of students in nonpublic schools tend not to be as litigious-minded as their public school counterparts, they will be understandably concerned about who will pay the expenses resulting from an injury involving a school function. When nonpublic schools do have medical insurance, the coverage tends to be secondary to that of the parents. But where using the parents' insurance policy as primary coverage will reduce the maximum policy limit, parents may be reluctant to use their own medical coverage if they believe the school was at fault. *See* Seals v. Loftis, 614 F. Supp. 302 (E.D. Tenn. 1985) (in case under IDEA, school district required to reimburse parents $90.70, the amount by which the lifetime maximum had been reduced when the district improperly required the parents to utilize their private medical coverage).

[14] A plaintiff may fail in his complaint either because a statutory or other legal standard prohibits the lawsuit, e.g., Willis v. Dade County Sch. Bd., 411 So. 2d 345 (Fla. Dist. Ct. App. 1982) (sovereign immunity), or because there were insufficient allegations or presentation of facts to meet the legal standard, e.g., Charpentier v. St. Martin Parish Sch. Bd., 411 So. 2d 717, 821 (La. Ct. App. 1982) ("In any event, plaintiffs failed to prove that defendant's allegedly negligent conduct even occurred. In fact, the evidence shows that it didn't. Having failed to prove this, plaintiffs are unable to prove that any conduct and/or omission of defendant was a cause-in-fact of Gwen's injuries. Third there is no need to proceed on to a determination of defendant's duty and whether that duty was breached.").

[15] There are only eight to ten states that still recognize sovereign immunity as a total. *See* E. CONNERS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE 13 (1981). *Compare* Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982) (sovereign immunity abolished prospectively) *with* Bego v. Gordon, 407 N.W.2d 801 (1987) (sovereign immunity prohibits lawsuits against school districts). Even where total sovereign immunity has been abolished, a state often preserves restrictions on lawsuits. *E.g.*, *see* King v. Little Rock Sch. Dist., 782 S.W.2d 374 (Ark. 1990) (state immunity applied to school district lease of two school buses because under governmental immunity statute, school district required to purchase liability insurance only on buses that it owned.) Robinson v. Indianola Mun. Separate Sch. Dist., 467 So. 2d 911 (Miss. 1985) (immunity for discretionary acts such as choice of location and construction of school building); Overcash v. Statesville City Bd. of Educ., 348 S.E.2d 524 (N.C. Ct. App. 1986) (immunity waived only as to injuries covered by insurance); DeKalb County Sch. Dist. v. Borden, 339 S.E.2d 356 (Ga. Ct. App. 1987) (immunity waived to extent of insurance dollar coverage).

harmless clauses or general contractual language is common in nonpublic institutions and not uncommon in public ones.[16]

All exculpatory clauses cases have in common the key element of informed consent.[17] Informed consent appears to require three aspects of cognition:[18] knowledge of the activity; comprehension (understanding) of the risks (hazards); and application (understanding) of risks to persons granting the consent. Needless to say, courts' decisions do not usually use those terms, but where informed consent is a permissible defense for an institution, the effect of the decisions is to consider both knowledge and understanding levels.

Judicial response to exculpatory clauses varies with the age of the participant or the nature of the activity - the younger the participant, the more dangerous the activities and the more potentially hazardous the risks to the participants, the more closely scrutinized will be the exculpatory language. Such language pertaining to risks of serious injury or death may be considered a violation of public policy, and may therefore be unenforceable,[19] or may be interpreted in such a restrictive manner that enforcement of the exculpatory language could hardly ever occur.[20] In *Porubiansky v. Emory University*,[21] the court determined consent forms signed by adults to receive reduced cost dental care from a university hospital were a violation of public policy because the hospital held itself out to perform a service and the purchaser was subject to the institution's superior bargaining power. Because the rationale for the court's public policy argument was that lawyers as a profession could not exculpate liability, and therefore dentists should not be

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[16] For samples of releases for different purposes see 12 Les Colleges 7-8 (Fall 1988). In addition to using release forms for traditional school events such as athletics and field trips, these forms have currently been extended to such events as Prom Night activities.

[17] The concept of informed consent has a fairly universal meaning in most legal contexts. Thus, the regulatory definition of "informed consent" under Family Educational Rights and Privacy Act (FERPA) as it applies to consent to release educational records is equally apposite to tort liability. "Informed consent" is "the knowing consent of an individual or his legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion." 45 C.F.R. § 46.103 (c). For discussion of the concept of "informed consent" in tort liability case, see Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

[18] See B. Bloom, Taxonomy of Educational Objectives, Handbook I: Cognitive Domain (1956); Ford, Design for Teaching and Training, 80-220 (1978).

[19] See Restatement of Contracts Second, § 512; Williston on Contracts, § 1750 A (3d ed. 1961). Minors are not able to sign enforceable releases because they are not legally competent. However, parents may sign a hold harmless agreement whereby they agree to indemnify the school in the event the minor sues for damages. Enforceability of hold harmless agreements will depend on state law.

[20] See Scruggs v. Coast Community College Dist., 239 Cal. Rptr. 916, 919 (Cal. Ct. App. 1987) (release signed by deceased prior to scuba diving course did not destroy wrongful death action by widow. "Any contract, intending to limit or destroy a cause of action which belongs to the heirs, should be construed with an abundance of caution.").

[21] 275 S.E.2d 363 (Ga. Ct. App. 1980).

able to either,[22] the case should have no effect on education since teaching is normally not subject to the same degree of statutory and regulatory licensure as are the other two professions.[23]

Although exculpatory clauses become issues in tort liability suits, the clauses will normally be interpreted according to the law of contracts because the clause is part of a quid pro quo (usually an exchange of money for services). As in all contracts, the language of exculpatory clause is critical. In *Sirashian v. Rawlins*[24] a student injured in a sky diving course was not barred from bringing an action in negligence despite a "release and hold harmless" provision absolving operators and instructors of the sky diving school "from any and all manner of actions" because the release did not specifically mention the school's negligence, fault or carelessness in instruction. In an earlier case in the same jurisdiction,[25] also involving a sky diving school, a court found a general release not to prohibit an injured participant's cause of action because the release did not specifically waive the failure by the teacher to instruct and the failure of the teacher to comply with FAA rules pertaining to securing a medical certificate from plaintiff prior to participating in sky diving. Similarly, in a California case involving a scuba diving course,[26] a release signed by a decedent student lacked specific language whereby he intended to assume all risks of the activity.[27]

However, exculpatory clauses do not necessarily fail because they are not specific, or because in their specificity they fail to mention a particular item. Releases may be quite successful where a court considers the language to be unambiguous. In *Bellefonte Insurance Company v. Queen*,[28] a court found as a matter of law that parents of a child killed after being struck at a crosswalk by a school bus were prevented from filing a lawsuit against the school board because of a "Special Release" they had executed. Despite the parents' claims that they had never intended to release the school board from all claims, the court found "unambiguous" the release of claims:

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[22] *Id.* at 169. For an indication that states are acting to give complete protection to medical informed consent agreements, except in cases of fraud, deception or misrepresentation, see *Whitlock*, *supra* note 17, interpreting N.C. GEN. STAT. § 90-21.13.

[23] Part of this difference is reflected in the fact that educational malpractice is not a viable cause of action, whereas legal and medical malpractice clearly are. *See generally* VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE, II 269-274 (1985).

[24] 451 N.Y.S.2d 307 (N.Y. App. Div. 1982).

[25] Gross v. Sweet, 407 N.Y.S.2d 254 (N.Y. App. Div. 1978).

[26] *Scroggs*, *supra* note 20.

[27] The release waived liability for "any accidents, illness, injury or death, or other consequences arising or resulting directly or indirectly form participation in SCUBA diving . . ." *Id.* at 917.

[28] 431 So. 2d 1039 (Fla. Dist. Ct. App. 1983).

> . . . we do hereby release, acquit and discharge the School Board . . . from all claims and demands, actions and causes of action, damages, costs, loss of services, expenses and compensation . . . and any and all-known and unknown, foreseen and unforeseen damages and the consequences thereof. . . .[29]

Likewise, in *Batting v. Hartford Accident and Indemnity Co.*,[30] parents had no action against a Catholic school for mentally retarded children. The court responded to the claim that the school had not performed a quasi-contractual obligation to secure adequate medical services, allegedly causing their child's comatose condition, by finding a complete defense in the parental signature to the application form releasing the school "from any and all liability of every nature, kind and description as a result of any injuries, hurt or damage sustained by the child herein described." Similarly, in *Poskozim v. Monnacep*, a sky diving student who broke his leg unsuccessfully alleged that the instructor had negligently approved the boots he wore.[31] Despite the Poskozim court's statement that "exculpatory agreements are not favored by the law,"[32] the court found "unambiguous" the language in the release exculpating the defendant school districts from "all such personal injuries, conscious suffering . . . resulting from or in any way connected with or arising out of instruction, training, and ground or air operations . . ."[33] But, the court went on to add, even had there been misconduct in approving plaintiff's boots, "such conduct would be characterized as instructional and the instant exculpatory agreement is explicit in its exculpation of all matters having to do with instruction."[34]

Specific language in a release can be supplemented by the injured party's knowledge. In *Whitlock v. Duke University*[35] an experienced ocean diver suffered organic brain damage after participating in a simulated experimental deep dive program. The diver had signed a consent form advising him of the risks of lung collapse, production of fluid, hearing loss, inflammation of the ear, sinusitis, as well the risk of decompression sickness, including death, disability and joint pain. Even though organic brain damage was not listed, plaintiff diver admitted he knew there existed such a risk associated with decompression. This knowledge of plaintiff seemed to be important because the scientist in charge of the program stated that "all risks pertaining to deep diving that had occurred in the past were included on the

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[29] *Id.* at 1040.
[30] 482 F. Supp. 338 (W.D. La. 1977), *aff'd* 608 F.2d 119 (5th Cir. 1979).
[31] 475 N.E.2d 663 (Ill. App. Ct. 1985).
[32] *Id.* at 665.
[33] *Id.* at 664.
[34] *Id.* at 665.
[35] 637 F. Supp. 1463 (M.D.N.C. 1986).

informed consent form," but organic brain damage was not "because it was not a normal condition for experimental deep diving."[36]

In a more unusual set of facts, a teacher who broke her arm when she fell off a donkey during a faculty-student donkey basketball game was found to have consented to the risk when the donkey ball company fulfilled its contract by instructing the participants prior to the game that donkeys buck and put their heads down causing people to fall off.[37] On the other hand, a release signed by a teacher having her car repaired in the school's auto mechanics shop could not forestall a negligence action where a rather comical set of mishaps to the car could have occurred only in the absence of adequate teacher supervision.[38]

Occasionally releases may involve situations other than personal injuries. In *Petock v. Thomas Jefferson University*[39] a student was legally bound by a signed agreement whereby the university permitted him to withdraw in exchange for his release (actually a withdrawal) of his civil rights ADEA claim against the university.[40] In two similar cases a student and faculty were unsuccessful in their defamation actions based on evaluations performed on them by the institutions. In *Baker v. Lafayette College*[41] a faculty handbook provision providing for annual evaluations not only was consented to when the faculty member signed his contract, but gave the college an absolute privilege to distribute those evaluations to persons in the faculty review process. In *Kraft v. W. Alanson White Psychiatric Foundation*[42] a student enrolled in a two-year training program who was denied a certificate of successful completion had actual knowledge of, and thus consented to, the catalog provisions stating the program was monitored and persons could be dismissed, which plaintiff should have reasonably understood to mean granting a certificate would occur only if the program was completed successfully.

Reliance upon exculpatory language in applications, handbooks or field-trip forms as a substitute for adequate instruction and supervision and safe equipment and facilities is ill-advised. However, exculpatory language and terms of the information communicated may play a vital role in the educational function. However, school officials need to be aware that constructing and relying on exculpatory clauses presents three levels of analysis. At the

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[36] *Id.* at 1469.

[37] Arbegast v. Board of Educ. of S. New Berlin Cent. Sch., 490 N.Y.S.2d 751 (N.Y. 1985).

[38] Steffen v. Baker, 398 N.Y.S.2d 355 (N.Y. Civ. Ct. 1976).

[39] 630 F. Supp. 187 (E.D. Pa. 1986).

[40] The court's emphasis that plaintiff-student, "an experienced attorney," drafted the agreement suggests that courts are less disposed to find justiciable claims based on coercion or duress in signing a release when the person executing the release is represented by an attorney. *Id.* at 190-91.

[41] 504 A.2d 247 (Pa. Super. Ct. 1986).

[42] 498 A.2d 1145 (D.C. 1985).

first level, schools need to determine whether clauses which seek to exculpate liability, as opposed to merely inform of risks, are readily enforceable in their jurisdiction.[43] At the second level, schools must determine the effect of specific exculpatory language on their clientele. School officials who seek to remove all liability for instruction, supervision and safety certainly face some policy problems: whether a nonpublic institution should be able to hold parents responsible for tuition but seek to absolve itself of all responsibility for the beneficiaries of that money (e.g. the students); whether exculpatory language projects an unfavorable image of the school's function and purpose; whether competition among schools for students could lead to a negotiated reduction in or elimination of the exculpatory language. At the third level, school officials must be aware of the levels of cognition represented by informed consent. However much adults may understand the exculpatory language, and thus find their claims limited or eliminated, the policy behind the voidability of minor contracts is that they are presumed not capable of the understanding necessary to render their contracts enforceable.[44] A better course of action would always be for schools to dedicate their energies toward providing a safe educational environment and eliminating the instructional and supervisory problems which form the basis for negligence actions.

Even though schools should not unduly rely on exculpatory language there are several reasons why releases may be helpful. First, depending on the jurisdiction, releases may protect the institution from liability. Second, releases may place students, at least the older secondary students and college students, on notice regarding their responsibilities. Third, releases may make injured parties feel they were informed regarding certain risks and therefore prevent a lawsuit being filed or at least provide leverage for a more equitable settlement. Fourth, releases may bolster an assumption of risk affirmative defense.

Legal Requirements

Educational institutions are not insurers of the safety of their students.[45] Liability for torts in general must be predicated upon at least one of three theories: strict liability; intentional acts; negligence. In line with judicial rejection of the insurer approach to education, courts have consistently refused to impose a strict liability theory on educational institutions, that is a theory of recovery which does not require proof of fault and breach of duty

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[43] *See supra* notes 19 and 20 and accompanying text.

[44] *See* Shine v. Wabash R.R. Co., 132 N.E.2d 41 (Ill. 1956); Vladimer v. Mt. Vernon Hebrew Camps, 172 N.E.2d 283 (N.Y. 1961).

[45] Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987); District of Columbia v. Doe, 524 A.2d 30 (D.C. 1987).

of care.[46] Intentional torts require general intent to commit an act and include the common torts of assault and battery[47] and intentional infliction of emotional distress,[48] as well as the quasi-intentional tort of defamation.[49] Intent generally denotes that the actors desired to cause the consequences of their acts or that they believed the consequences were substantially certain to result from the acts; mere knowledge and appreciation of risk, short of substantial certainty, is probably not equivalent to intent.[50] Negligence, by far the most frequently used theory, has four legal requirements that

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[46] *See* Fallon v. Indian Trail Sch., 500 N.E.2d 101 (Ill. App. Ct. 1986) (trampoline not intrinsically dangerous so as to impose strict liability); Dibortolo v. Metropolitan Sch. Dist. of Washington Township, 440 N.E.2d 506 (Ind. Ct. App. 1982) (physical education class not inherently dangerous setting). Strict liability is normally imposed by courts or legislatures on activities which are inherently dangerous. Indiana Belt Harbor R.R. Co. v. American Cyanamid Co., 517 F. Supp. 314 (N.D. Ill. 1981) (shipping hazardous and toxic substance); Caparole v. C.W. Blakeslee & Sons, Inc., 175 A.2d 561 (Conn. 1961) (pile driving); Peet v. Dolese & Shepard Co., 190 N.E.2d 613 (Ill. App. Ct. 1963) (storage and use of explosives); Proud v. W.S. Bills & Sons, Inc., 255 N.E.2d 64 (Ill. App. Ct. 1970) (excavations). State Worker Compensation statutes are classic examples of a strict liability approach to providing a remedy for injured employees. Employee remedy does not hinge on the issue of fault but on statutory employment questions. Warthen v. Southeast Okla. State Univ., 641 P.2d 1125 (Okla. Ct. App. 1981) (causal connection between employment and injury); Lockwood v. Independent Sch. Dist. No. 877, 312 N.W.2d 924 (Minn. 1981) (inclusion of injury within the statute); Cameli v. Pace Univ., 516 N.Y.S.2d 228 (N.Y. App. Div. 1987) (control of employee as requirement for employment relationship); Graczyk v. W.C.A.B., 229 Cal. Rptr. 494 (Cal. Ct. App. 1986) (scholarship athlete not employee); Davis v. New York City Bd. of Educ., 445 N.Y.S.2d 626 (N.Y. App. Div. 1981); Board of Educ. of Chicago v. Chicago Teachers Union, Local No. 1, 427 N.E.2d 1199 (Ill. 1981) (amount of recovery).

[47] BLACK'S LAW DICTIONARY 147, 193 (4th ed. 1961) (assault is reasonable apprehension of a battery; battery is the unlawful touching of another). *See* Rodriguez v. Johnson, 504 N.Y.S.2d 379 (N.Y. Civ. Ct. 1986) (slapping by school bus matron); Gaspersohn v. Harnett County Bd. of Educ., 330 S.E.2d 489 (N.C. Ct. App. 1985) (spanking by school administrator with a paddle).

[48] M. APPLEMAN, ILLINOIS TORT LAW AND PRACTICE 217 (Supp. 1987) (usually described as requiring conduct which is "outrageous" or "beyond all possible bounds of decency"). However, the cause of action for intentional infliction of emotional distress is easier to state than to prove. *See* Russell v. Salve Regina College, 938 F.2d 315 (1st Cir. 1991) (even though student nurse had cause of action for breach of contract when college failed to honor weight loss contract, she had no intentional infliction of emotional distress claim regarding college's treatment of her obesity); Hammond v. Katy Indep. Sch. Dist., 821 S.W.2d 174 (Tex. Ct. App. 1991) (no action for intentional infliction of emotional distress because statements allegedly made by principal and school psychologist were not egregious and were made in scope of employment); Gruner v. Garner, 426 So. 2d 972 (Fla. Dist. Ct. App. 1983) (former community college employee had no cause of action for intentional infliction of emotional distress against president for sexually suggestive invitations because the claim was not recognized in Florida).

[49] BLACK'S LAW DICTIONARY 505 (4th ed. 1951) (defamation includes common law torts of libel and slander). *See* Joseph v. Elam, 709 S.W.2d 517 (Mo. Ct. App. 1986)(judgment of $3,000 upheld by former Dean of Students against acting President in slander action where defendant untruthfully stated that plaintiff was an ex-convict).

[50] *See* Gonger v. Hardtke, 482 N.W.2d 84, 89 (Wis. 1992) (the act of one student throwing a piece of soapstone in a classroom at another student, even with intent to hit the student, "is not so substantially certain to cause injury that a court may infer an intent to injure;" in this case, the presence or absence of "intent to injure" was critical as to whether plaintiffs had filed their complaint within the statute of limitations for intentional torts which was shorter than the statute for negligence); Pennsylvania Millers Mutual Ins. Co. v. Crews, 361 S.E.2d 657

apply equally to public and nonpublic educational institutions: a legal duty; breach of the duty; proximate cause; and injury.

A legal duty is one "which the law requires to be done or forborne to a determinate person or the public at large."[31] Legal duties for schools are normally based on relationship of school to student[32] or on a statute.[33] The absence of a legal duty will be fatal to a plaintiff's negligence complaint. In *Hartman v. Bethany College*,[34] the college owed no duty to a seventeen-year-old student assaulted after meeting two males at an off-campus bar. "It would be inconsistent with the case law in this area to impose a duty upon colleges to supervise students when they leave the college campus for non-curricular activities. It would also not be consistent with the settled expectations of students, parents or colleges."[35] Likewise, in *Laiche v. Kohen*,[36] elementary school coaches and their schools owed no duty to a 110-pound eighth grader whose leg was fractured when fallen on during a scrimmage football game by another 270-pound eighth grader. The court was "unable to find a basis for imposing on coaches a duty to their players to protect against the risk of injury from playing a football game with players of different weights."[37] At least five legal duties have been recognized: utilization of

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(Ga. Ct. App. 1987) (school principal's testimony that when he spanked child he expected to cause pain, but not the physical injury resulting from the child twisting to avoid a second swat, was sufficient to make inapplicable insurance company's exclusion for bodily injury intended by the insured).

[31] BLACK'S LAW DICTIONARY 1039 (4th ed. 1951). Not all alleged injuries are remediable because courts will occasionally refuse to recognize a cause of action like educational malpractice where a student's educational deficiencies have been nondiagnosed or misdiagnosed or the student has been placed in the wrong setting. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); Smith v. Alameda County Social Serv. Agency, 90 Cal. App.3d 929 (Cal. Ct. App. 1979); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (N.Y. App. Div. 1982); Pietro v. St. Joseph's Sch., 48 U.S.L.W. 2229 (N.Y. Sup. Ct. 1979). However, see Savino v. Board of Educ. of Sch. Dist. No. 1, 506 N.Y.S.2d 210 (N.Y. App. Div. 1986) (failure to warn parent of psychological problems of student did not constitute educational malpractice and therefore claim not dismissable).

[32] Toure v. Board of Educ. of New York, 512 N.Y.S.2d 150 (N.Y. App. Div. 1987) (duty toward student the same as that owed by a reasonably prudent parent); Boltax v. Joy Day Camp, 493 N.Y.S.2d 590 (N.Y. App. Div. 1985) (no duty owed to trespasser injured in pool at night after climbing over fence).

[33] Rodriguez v. Inglewood Unified Sch. Dist., 230 Cal. Rptr. 823 (Cal. Ct. App. 1986) (duty to protect students flows from compulsory attendance statutes); Scott v. Independent Sch. Dist. No. 709, 256 N.W.2d 485 (Minn. 1977) (duty to protect student based on statute requiring wearing of goggles in certain courses).

[34] 778 F. Supp. 286 (N.D.W.Va. 1991).

[35] *Id.* at 291.

[36] 621 So. 2d 1162 (La. Ct. App. 1993).

[37] *Id.* at 1165.

competent and proficient personnel;[58] adequate supervision;[59] adequate instruction;[60] furnishing and maintaining safe equipment and safe premises;[61] making and enforcing adequate rules.[62]

Duty of care can also be created by a special relationship. In *Kleinknecht*

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[58] This duty has most recently been addressed in causes of action called negligent hiring, supervision or retention of an employee. Nance v. Mathews, 622 So. 2d 297 (Ala. 1993) (principal, nurse and supervisor of special education entitled to qualified immunity as to supervision and retention of aide); Greening v. School Dist. of Mallard, 393 N.W.2d 51 (Neb. 1986) (use of unlicensed employee for physical therapy not proximate cause of injury); Willoughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986) (negligent hiring or supervision claim rejected because hiring and supervision covered by governmental immunity); Fallon v. Indian Trail Sch., 500 N.E.2d 101 (Ill. App. Ct. 1986) (failure to investigate teacher credentials and teaching abilities or permitting unqualified teachers to continue teaching is not negligent hiring unless the student injury arises from a particular unfitness of an applicant); Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986) (cause of action for negligent continuation of teacher existed where school district continued to employ teacher after knowledge of sexual abuse of children). Older cases approached the negligence of personnel competency from the more traditional aspects of failure to adequately instruct or supervise. O'Brien v. Township High Sch. Dist., 392 N.E.2d 615 (Ill. App. Ct. 1979) (attempted treatment of athlete by a student); Garber v. Central High Sch. Dist., 251 N.Y.S.2d 214 (N.Y. App. Div. 1937) (janitor supervising noon-time gym activities); Nickley v. Skemp, 239 N.W. 426 (Wis. 1930) (failure of unlicensed nurse interns to recognize symptoms).

[59] Velez v. Our Lady of Victory Church, 486 N.Y.S.2d 302 (N.Y. App. Div. 1985) (no liability for lack of supervision for desk toppling over in classroom where no notice of such occurrences in past); Smith v. Archbishop of St. Louis, 632 S.W.2d 516 (Mo. Ct. App. 1982) (liability for lack of supervision where second grader's paper costume came in contact with lighted candle); Levine v. Live Oak Masonic Housing, 491 So. 2d 489 (La. Ct. App. 1986) (no liability for school for lack of supervision following two deaths from defectively wired air conditioner when student had ignored warnings about splicing wires).

[60] Potter v. North Carolina Sch. of the Arts, 245 S.E.2d 188 (N.C. 1978) (liability incurred for failure to instruct student on use of fog machine); County of Riverside v. Loma Linda Univ., 173 Cal. Rptr. 317 (Cal. Ct. App. 1981) (liability for inadequate instruction of medical residents); Lawrence v. Grant Parish Sch. Bd., 409 So. 2d 1316 (La. Ct. App. 1982) (failure to instruct student of hazards of using table saw without guard prevented school's assumption of risk defense. *But see* Koch v. City of Avon Bd. of Educ., 580 N.E.2d 809 (Ohio Ct. App. 1989) (physical education teacher and high school not liable for injury to student while performing squat vaults over vaulting horse where entire class had received lecture on use of the equipment and the applicable safety precautions and instructor had demonstrated the vaults for the students).

[61] Dristy v. Waterford Sch. Dist., 379 N.W.2d 428 (Mich. Ct. App. 1985) (school responsible for sidewalks outside school); Singer v. School Dist. of Phila., 513 A.2d 1108 (Pa. Commw. Ct. 1986) (school liable for absence of mat around vaulting horse); Bush v. Oscada Area Sch., 250 N.W.2d 739 (Wis. 1977) (classroom unsafe for laboratory experiment); Knight v. City of Phila., 445 A.2d 778 (Pa. Super. Ct. 1982) (unsafe equipment). The hiring or posting of security guards does not in itself create a special duty of protection. Corcoran v. Community Sch. Dist., 494 N.Y.S.2d 747 (N.Y. App. Div. 1985); Ferrara v. Board of Educ., 498 N.Y.S.2d 10 (N.Y. App. Div. 1986). School liability would be based only on reliance by an employee regarding safety of premises. *See* Carlie A. v. City of New York, 532 N.Y.S.2d 163 (N.Y. App. Div. 1988) (rape of teacher required to stay late after principal's assurances that custodian patrolled building).

[62] Gathright v. Lincoln Ins. Co., 688 S.W.2d 931 (Ark. 1985) (duty of rule making did not require detailed supervisory safety program); Matteucci v. High Sch. Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972) (failure to enforce rules); Lynch v. Board of Educ. of Collinsville, 390 N.E.2d 526 (Ill. App. Ct. 1979) (failure to make and enforce rules).

v. *Gettysburg College*,[63] the fact that a student had been actively recruited to play lacrosse was sufficient to create a duty of care for the college to have athletic trainers at fall semester practice sessions. Following the student's death by cardiac arrest at one of these practices, the court observed that

> [t]here is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic, or otherwise . . . . Had [deceased student] been participating in a fraternity football game, for example, the College might not have owed him the same duty or perhaps any duty at all . . . . [T]he fact that [the student's] cardiac arrest occurred during an athletic event involving an intercollegiate team of which he was a member does impose a duty of care on a college that actively sought his participation in that sport. We cannot help but think that the College recruited [deceased] for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students.[64]

However, a legal duty based on a special relationship requires more than participation in a school function. In *Albano v. Colby College*,[65] a private college was not liable for severe injuries to an eighteen-year-old student member of the college's tennis team while in Puerto Rico over spring break. The student had been injured after disobeying the coach's instructions not to drink excessively or leave the resort area. The court found dispositive that the student was an adult for purposes of consuming alcohol in Puerto Rico (legal age was eighteen in Puerto whereas legal age in Maine where College is located was twenty-one), and the injury did not occur on College premises. "[T]he mere ability to control—assuming that the coach or Colby College had such an ability here—does not give rise to a legal duty. . . .The fact that the coach directed the students for their own safety to stay on the hotel grounds at all times and not to drink liquor to excess did not create 'a

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[63] 989 F.2d 1360 (3d Cir. 1993). The use of special relationship as a basis for negligence in *Kleinknecht* may represent a change in judicial thinking which to date has refused to permit special relationship to support a cause of action to recover in child abuse situations. *See* Mawdsley, *Compensation for the Sexually Abused Student*, 84 EDUC. L. REP. 13 (1993); Sorenson, *School District Liability For Federal Civil Rights Violations Under Section 1983*, 76 EDUC. L. REP. 313 (1992). *See* also Deshaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989) (state's knowledge of danger to a child in father's custody did not create special relationship between state and child so as to create duty to protect child); Rasivong v. Lakewood Community College, 504 N.W.2d 778 (Minn. Ct. App. 1993) (college as landowner where ethnic festival held had no special relationship with bystander at festival and thus no duty to protect that person from a criminal assault by an unknown third party).

[64] *Kleinknecht*, 989 F.2d at 1368.

[65] 822 F. Supp. 840 (D. Me. 1993).

relationship of dependence' that would give rise to a legal duty where none existed to start with . . . ."[66]

The second requirement is a breach of legal duty. The determination of a breach is measured by the reasonable person (a retrospective test) and foreseeability (a prospective test) tests. The actual teacher whose conduct is at issue is measured against the hypothetical reasonable person's characteristics of "intelligence, physical attributes, perception and memory, and special skills."[67] The average school official will be assumed to be of average intelligence[68] and the burden will be on an injured plaintiff to prove that any alleged mental unfitness caused the injury.[69] Of course, students will also be assumed to have the average intelligence of persons of their age and maturity. In a Maryland case of first impression, *Hammond v. Board of Education of Carroll County*,[70] the state court of appeals determined that a sixteen-year-old female seriously injured while playing in her first high school football scrimmage was not entitled to any special warning regarding possible physical injury in football because as a person "at least of average intelligence" the risk of injury in voluntary contact sports is "common knowledge."[71] *In Levine v. Live Oak Masonic Housing, Inc.*,[72] two vo-tech students (ages eighteen and thirty-seven) were considered by the court to be "mature young men" and thus solely liable for two deaths ($130,000 damages) which resulted from their failure to heed the instructor's warning concerning not splicing wires on an air conditioner, repaired by the students and installed in a building destroyed by a fire determined to be caused by the improper wiring. Similarly, a high school student, severely burned during a science laboratory experiment, could not recover against the instructor because even though the students were average or below average in intelligence ("not the brightest") the students conduct did not "conform to that which would be expected of a similarly situated child of the same age and with the same capacity, discretion, knowledge and experience in creating the initial fire."[73] Like intelligence, physical attributes can apply to both teachers and students. When two large male students began fighting in her class,

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[66] *Id.* at 842.

[67] E. Connors, Education Tort Liability and Malpractice 9 (1981).

[68] *E.g.*, Green v. Orleans Parish Sch. Bd., 365 So. 2d 834 (La. 1979) (teacher's "reasonable man" intelligence reinforced by expert witness testimony).

[69] *Fallon*, 500 N.E.2d at 481-82 (mentally handicapped employee hired by school may have some degree of unfitness but the unfitness is not justiciable unless it results in harm).

[70] 639 A.2d 223 (Md. Ct. App. 1994).

[71] *Id.* at 226.

[72] 491 So. 2d 489 (La. Ct. App. 1986).

[73] Rixmann v. Somerset Pub. Sch., 266 N.W.2d 326 (Wis. 1978) ($33,400 judgement against teacher reversed leaving student-plaintiff with only remedy for damages against two student lab partners).

a female teacher was justified in leaving the room to seek help from the principal next door.[74] Likewise a teacher's use of a wrestling hold to compel an unruly and struggling student to the school office was permissible physical contact under state law,[75] and a teacher could recover a $6,000 compensatory and $23,000 punitive damages award against a student who had viciously attacked him when he caught the student smoking outside the building.[76] However, unnecessary or excessive physical contact between a large school employee and a smaller student can result in damages for the student.[77] Perception and memory requires school personnel to use their senses of observation and knowledge of past experience to "be alert to conditions which may be dangerous to participants, such as rowdyism, defective premises, lack of use of protective devices or safety equipment, and the age-skill experience of the participants in relation to the assumption of risks."[78] By definition, perception and memory is very subjective and can include problem areas such as use of a student teacher as a substitute teacher,[79] necessity of supervisory personnel in school or at a school event,[80] adequacy or appropriateness of equipment,[81] responsibility for intentional acts by non-students against students,[82] awareness of student conflicts,[83] deviations from curriculum guides,[84] changing the standard rules of a game,[85] school or com-

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[74] Kim v. State of Haw., 616 P.2d 1376 (Haw. 1980).

[75] Willoughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986).

[76] Anello v. Savignac, 342 N.W.2d 440 (Wis. Ct. App. 1983).

[77] Rodriquez v. Johnson, 504 N.Y.S.2d 379 (N.Y. Civ. Ct. 1986) (damages awarded for school bus matron's slap on face of child talking loudly and moving about in his seat even though the slap itself was not an excessive use of force); Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980) (teacher liable for bruises to student's neck after he was squeezed by teacher about two hours after student had shot rubber band in face of teacher).

[78] H. HUDGINS, JR. & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 86 (1985).

[79] Brahatcek v. Millard Sch. Dist. No. 17, 372 N.W.2d 680 (Neb. 1979).

[80] Cook v. School Dist. UH3J, 731 P.2d 443 (Or. Ct. App. 1987) (complaint dismissed for failure to state cause of action even though court found that invitation to students of two schools to attend a game was sufficient to establish relationship giving rise to duty on part of school districts to take precautions to protect plaintiff from reasonably foreseeable acts of third parties); Comuntzis v. Pinellas County Sch. Bd., 508 So. 2d 750 (Fla. Dist. Ct. App. 1987) (school had duty to provide supervisory person in cafeteria).

[81] Ausmus v. Board of Educ. of Chicago, 508 N.E.2d 298 (Ill. App. Ct. 1987) (furnishing too heavy bat to third grader).

[82] Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987) (issue for jury presented as to whether school official's supervisory duty included warning students about sexual assaults in the area and taking preventive steps like trimming bushes near doorway).

[83] Gammon v. Edwardsville Community Unit Sch. Dist., No. 7, 403 N.E.2d 43 (Ill. App. Ct. 1980) (knowledge of acrimonious relationship creates duty to prevent confrontation).

[84] Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1980) (altering requirements for physical education gymnastics class).

[85] Sutphen v. Benthian, 397 A.2d 709 (N.J. 1979) (increasing number of students in floor hockey game).

munity problems such as racial unrest,[86] supervision of retarded students,[87] and dangerous premises discoverable upon examination.[88] Special skills refer not only to skills which a faculty member has and can reasonably be expected to communicate to students,[89] but also to special skills possessed by a student which absolve or mitigate a faculty member's duty to instruct or supervise.[90] Not all activities require special skills. Thus, student paralysis resulting from a student's arching his back during a 30 second physical education class wrestling drill did not generate liability because a student arches his back naturally without having to be taught.[91] However, the assembling or operation of equipment by students usually assumes that they must be instructed in order to acquire the requisite skills.[92]

In summary then, the hypothetical reasonable person standard is an objective attempt to determine whether, in retrospect, a person with the same duties (teacher, administrator, coach) working with the same clientele (varying age and skill levels) under similar circumstances (classroom, field trip, day camp, athletic event) would have acted the same way. But school personnel liability is measured not only, in retrospect, by how they should have satisfied their duties (reasonable person) but the extent to which, in prospective, they should have anticipated the effects of their actions (foreseeability). Foreseeability is determined by "the age, relationship, and physical characteristics of the parties involved; the gravity and probability of danger presented; and the necessity and utility of the actor's conduct."[93] Foreseeability is an extremely fluid concept and to what extent a person's injury is foreseeable is often related to such factors as whether: the school had prior notice of similar incidents;[94] the injury or damages were intention-

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[86] Raleigh v. Independent Sch. Dist. No. 625, 275 N.W.2d 572 (Minn. 1978) (increased supervision required on school district field trip to film on Martin Luther King, considering racial unrest in some schools).

[87] Foster v. Houston Gen. Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981) (retarded child's running across street against light was foreseeable).

[88] Adoin v. Evangeline Parish Sch. Bd., 376 So. 2d 372 (La. 1979).

[89] Potter v. North Carolina Sch. of the Arts, 245 S.E.2d 188 (N.C. 1978) (operation of fog machine); Lawrence v. Grant Parish Sch. Bd., 409 So. 2d 1316 (La. Ct. App. 1982) (operation of electric power saw).

[90] Paulsen v. Unified Sch. Dist. No. 368, 717 P.2d 1051 (Kan. 1986) (student had experience in prior woodworking class using table saw); Miles v. School Dist. No. 138, 281 N.W.2d 396 (Neb. 1979) (prior experience with jointer).

[91] Green v. Orleans Parish Sch. Bd., 365 So. 2d 834 (La. 1979).

[92] Miller v. Macalester College, 115 N.W.2d 666 (Minn. 1962) (no instruction on assembling scaffolding); Brittan v. State, 103 N.Y.S.2d 485 (N.Y. 1951) (inadequate instruction on operation of physical fitness testing equipment).

[93] W. VALENTE, LAW IN THE SCHOOLS 433 (3d ed. 1994).

[94] Doe v. Howell, 441 S.E.2d 767 (Ga. Ct. App. 1994) (no evidence of prior forced sexual acts); Adams v. Caddo Parish Sch. Bd., 631 So. 2d 70 (La. Ct. App. 1994) (eruption of fight between two students waiting to see administrator after being taken to office by teacher for fighting did not create liability for school personnel or school district where a fight in the administrative area had never occurred within memory of long-time school employees); Carr v. Indian Lake

ally inflicted;[95] a school rule or state statute was specifically directed to the misconduct which produced the injury or damages;[96] or students were engaging in voluntary activity outside the school program.[97] In *Kleinknecht*,[98] the Third Circuit Court of Appeals reversed summary judgment for a private college as to a lacrosse player, recruited by the College, who collapsed and died of cardiac arrest during a practice scrimmage while no trainers were available at the practice field. In its decision, the Third Circuit Court of Appeals noted that

> [t]he type of foreseeability that determines the duty of care, as opposed to proximate cause, is not dependent on the foreseeability of a specific event . . . . Though the specific risk that a person like [deceased student] would suffer a cardiac arrest may not be foreseeable, the [plaintiffs] produced ample evidence that a life-threatening injury occurring during participation in an athletic event like lacrosse was reasonably foreseeable.[99]

In addition to creating duty of care, foreseeability is very much a key element in tying the first two negligence factors, duty and breach of duty, to the third, proximate cause. Proximate cause is the logical and sequential con-

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Sch. Dist., 496 N.Y.S.2d 950 (N.Y. App. Div. 1985) (no liability for injury to student's eye from thrown snowball where school had no notice of prior snowball throwing on school property); Brown v. City of New York, 516 N.Y.S.2d 22 (N.Y. App. Div. 1987) (no liability for stabbing where school had no actual notice of vicious propensities of student). *Contra* Phyllis P. v. Superior Court, 228 Cal. Rptr.2d 776 (Cal. Ct. App. 1986) (school's knowledge of sexual molestation of 8-year-old girl by another student created duty to notify parent and failure to do so created liability for emotional distress after girl later raped by same student).

[95] District of Columbia v. Doe, 524 A.2d 30 (D.C. Cir. 1987) (school not liable for intervening criminal act of rape of student). *But see* Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986) (intentional act of teacher sexually molesting fourth grade student not defense to school district where cause of action was negligent hiring and retention).

[96] Kavanaugh v. Orleans Parish Sch. Bd., 487 So. 2d 533 (La. Ct. App. 1986) (statutory duty to provide "reasonably safe "environment did not apply to armed robbery of teacher where robbery could not have been reasonably foreseen from unrepaired hole in fence through which robbers entered); Scott v. Independent Sch. Dist. No. 709, 256 N.W.2d 485 (Minn. 1977) (statute requiring wearing of goggles in shop classes created liability even though injured student repeatedly took off goggles, despite numerous warnings from teacher). *Cf.* Eisel v. Board of Educ. of Montgomery County, 597 A.2d 447 (Md. 1991) (although state's Youth Suicide Prevention School Programs Act did not create statutorily based cause of action against school counselor who failed to intervene in a potential suicide, the court did find compatible with the Act a common law duty of reasonable care for counselors to prevent suicides when they have evidence of suicidal intent).

[97] Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987) (no liability by college where students voluntarily participated in recreational baseball and knew there would be no professional coaching assistance or supervision, or any written guidelines for play); Rhea v. Grandview Sch. Dist. No. JT, 694 P.2d 666 (Wash. Ct. App. 1985) (no liability for alcohol-related death at release-day party where faculty advisor and principal had mere knowledge alcohol might be consumed and no district employee or agent was involved in planning or was present at party).

[98] 989 F.2d 1360 (3d Cir. 1993).

[99] *Id.* at 1369, 1370.

nection "closely related in time, space or order"[100] between duty and breach of duty on one hand and injury on the other. There are three basic requirements in establishing proximate cause: (1) the injury would not have occurred "but for" the breach; (2) the injury must be the natural and probable result of the breach; (3) there is no efficient intervening cause.[101]

The absence of proximate cause frequently plays a key role in a finding of no liability. In *Maness v. City of New York*,[102] a school district was not responsible for the murder of a junior high student outside the school during lunch break where the student's mother failed to prove that there had been inadequate supervision, in light of the intervening act by the boy who shot the student and the absence of anticipation that altercation between the two boys would result in injury. In *Griffith v. City of New York*,[103] a school whose nurse had denied treatment to an asthmatic fourteen-year-old girl was not responsible for the girl's subsequent serious injuries after falling from her apartment window because when she left school and went home she came under the control and protection of her mother. In *Pedersen v. Joliet Park District*,[104] a student participating in a basketball game could not recover for injuries suffered in a fall when he offered no evidence that the floor was slippery from dust or wax. In *Lecandoski v. Jackson County School District*,[105] a school was not liable for the murder of a thirteen-year-old girl who had skipped out of school between classes even though a school procedure required reporting deviations from the circulated absence list and one teacher had failed to do so. In an egregious set of facts, a high school teacher was not the cause of a student's injuries in the wreck of an automobile driven by another person shortly after the teacher had falsely told the student that he had failed an advanced electronics test. The teacher's rather improbable explanation for deliberately giving the wrong information to the student was that he "wanted [the student] to know what it felt like to fail."[106]

On the other hand, proximate cause exists where plaintiffs have established a logical connection between breach of a duty and an injury. In California, a school district was liable for injuries suffered by a child who was hit by a car after leaving school early because a California statute imposed on school districts the duty to "supervise at all times the conduct of the children

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[100] Connors, *supra* note 67 at 8.
[101] Greening v. School Dist. of Midland, 393 N.W.2d 51, 53 (Neb. 1986).
[102] 607 N.Y.S.2d 325 (N.Y. App. Div. 1994).
[103] 507 N.Y.S.2d 446 (N.Y. App. Div. 1986).
[104] 483 N.E.2d 21 (Ill. App. Ct. 1985).
[105] 328 So. 2d 339 (Miss. 1976). *See also* Chavez v. Tolleson Elementary Sch. Dist., 595 P.2d 1017 (Cal. 1979).
[106] Rogers v. Retrum, 825 P.2d 20, 21 (Ariz. Ct. App. 1991).

on school grounds."[107] In *Toeller v. Mutual Service Casualty Insurance Co.*,[108] a bus driver who had excluded a student from his bus but without notifying the parents or school authorities was liable for injuries suffered by the eleven-year-old when he was struck by a truck as he was riding his bicycle to school. In a particularly difficult set of facts, a court refused to find the absence of proximate cause when a school counselor, notified that a student had threatened to commit suicide, failed to notify the student's parents and the student shortly thereafter committed suicide.[109] The state had a Youth Suicide Prevention School Programs Act[110] and the court observed that "Maryland tort law should not treat an adolescent's committing suicide as a superseding cause when the entire premise of the Act is that others, including the schools, have the potential to intervene effectively."[111] Finally, in a case that pressed foreseeability and proximate cause almost to the point of strict liability, a school district was found liable for serious cosmetic damage to a student's finger as she attempted to retrieve her coat thrown by another student on top of a 6'5 1/2" locker. The court reasoned that a 1/16" protrusion on top of the locker on which the student caught her finger, a strand of a mop which had become caught on the protrusion, complaints to the principal by the girl and her mother regarding the girl's coat being thrown on top of the locker, a school rule prohibiting the throwing of coats, and the location of the locker outside the principal's office all added up to the somewhat improbable finding of proximate cause.[112]

The fourth legal requirement in negligence action is an injury.[113] An injury must be real rather than imagined[114] and courts are generally reluctant to award damages where there is not some form of physical contact or

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[107] Hoyem v. Manhattan Beach City Sch. Dist., 585 P.2d 851 (Cal. 1978). *But see* Rogers v. Bertram, 825 P.2d 20 (Ariz. Ct. App. 1991) (although citing *Hoyem* as valid precedence for school liability for off-campus students, the Arizona court nonetheless found a high school did not breach its duty of supervision to a student injured in an automobile driven by a fellow student when the students had left school during the school day, the school had a policy permitting students to leave and enter the school during the school day).

[108] 340 N.W.2d 923 (Wis. Ct. App. 1983).

[109] Eisel v. Board of Educ. of Montgomery County, 597 A.2d 447 (Md. 1991).

[110] MD. ANN. CODE, art. 7, §§ 7-4A-01 through 7-4A-06 (1992).

[111] *Eisel*, 597 A.2d at 454.

[112] Kingsley v. Independent Sch. Dist., Hill City, 251 N.W.2d 634 (Minn. 1977).

[113] At least one state, Illinois, protects the right to recover for wrongs, declaring in article I, § 12 of its constitution: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."

[114] *See* Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981) (damages and injunctive relief denied to parents of four children who were among 22 of 23 children not promoted to third grade on the basis of reading level, as being beyond court expertise); Elias v. Youngken, 493 A.2d 138 (R.I. 1985) (no defamation in referring to employee as "terminated" so as to support claim of emotional distress).

injury.[115] Injuries do not need to be substantial in order for a plaintiff to recover. In *Thomas v. Bedford*,[116] a fourteen-year-old student who had earlier shot a rubber band in a teacher's face received $500 in damage when the teacher later gave the student a "severe shaking." The presence of minor contusions on the student's chest, arm, and back demonstrated to the court that the teacher's conduct was less than reasonable. In *Rodriguez v. Johnson*,[117] a slap on a student's face which left no visible marks but which made the child apprehensive about going to school resulted in a $250 award to the child's mother. Mere humiliation such as that which might be alleged to occur if a student is isolated, made to stand or sit in a corner, or required to sing or recite in front of the class would not be compensable.[118] However, teacher conduct which is "outrageous" or "beyond all possible bounds of decency" could be the basis for intentional infliction of emotional distress.[119]

Defenses to Tort Liability

Defenses to tort liability are a way of avoiding, or at least diminishing, liability. The most common defenses to avoid all liability are consent and assumption of risk. A preceding section, "Exculpatory Clauses," discussed one of the more frequently used aspects of consent or assumption of risk in nonpublic schools. Contributory negligence can be a complete defense in a state that does not recognize comparative negligence as well as a method of reducing the amount of financial recovery in a state that does recognize comparative negligence.

Assumption of risk is an available defense where "none of the fault for injury rests with plaintiff, but where plaintiff assumes consequences of injury occurring through fault of defendant, third party, or fault of no

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115 See Gomez v. Garner, 426 So. 2d 972 (Fla. Dist. Ct. App. 1983) (no cause of action for intentional infliction of emotional distress allegedly resulting from odious, sexually suggestive invitations where there had been no physical contact).

116 380 So. 2d 405 (La. Ct. App. 1980).

117 504 N.Y.S.2d 479 (N.Y. Civ. Ct. 1986).

118 See Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986), *aff'd in part*, 491 U.S. 701 (1989) (humiliation or embarrassment stemming from transfer to a different position not significant enough to support claim for constructive discharge); Irving v. J.L. Marsh, 360 N.E.2d 983 (Ill. App. Ct. 1977) (humiliation not compensable).

119 See Russell v. Salve Regina College, 890 F.2d 484, 487–488 (1st Cir. 1989) (court rejected obese student nurse's claim of intentional infliction of emotional distress based on college's using plaintiff to model hospital procedures incident to the care of obese patients, prolonged lectures and discussions about weight loss, and contract making continued participation in nursing program contingent on weight loss of two pounds per week: "the College's conduct may have been unprofessional, but we cannot say that it was so far removed from the bounds of civilization as not to comply with the test set forth in [Restatement of Torts (Second)] § 46 [extreme and outrageous conduct]").

one."[120] An important element of this defense is that a plaintiff must have known and appreciated the risk which resulted in injury. In *Hoeffner v. The Citadel*,[121] a student who had experienced emotional difficulties and had thoughts of suicide reported these difficulties to the school physician. The physician continued to treat the student for unrelated medical problems despite noting ongoing depression and suicidal thoughts. The student, approximately four months after first going to the physician, hanged himself in his room. The parents filed suit for negligence in caring for their son and, following the trial court's instruction to the jury that the suicide could constitute evidence of assumption of risk, the jury returned a verdict for the physician and the school. In reversing the verdict, the state supreme court observed that where a party has a duty to prevent a person from committing suicide,

> the very suicide which the defendant has a duty to prevent cannot constitute assumption of risk . . . as a matter of law . . . . The defense of assumption of risk applies where the plaintiff assumes a risk of harm arising from the defendant's negligent or reckless conduct rather than his own. In the absence of express consent to assume the risk, the plaintiff's conduct can be said to imply assumption of risk where it is shown that he understood and appreciated a known danger created by the defendant, and then freely and voluntarily exposed himself to it. [In this case], it is clear that [the student's] act of suicide cannot establish that he assumed a risk of harm created by the defendant's negligence in caring for his mental health.[122]

A more common defense is contributory negligence which is "an act or omission amounting to want of ordinary care on part of the complaining party, which occurring with defendant's negligence, is proximate cause of injury."[123] If the contributory negligence occurs in a state which recognizes comparative negligence, then some degree of negligence by the complaining party will not prevent recovery of damages, and the measure of damages will be determined by deducting the percentage of the complaining party's negligence from the damages award.[124] In comparative negligence states, courts

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[120] BLACK'S LAW DICTIONARY 157-58 (4th ed. 1964).

[121] 429 S.E.2d 190 (S.C. 1993).

[122] *Id.* at 193 (emphasis in original).

[123] BLACK'S LAW DICTIONARY 1185 (4th ed. 1964).

[124] *E.g.*, *see* Williams v. Cahill, 629 N.E.2d 1175 (Ill. App. Ct. 1994) (40% negligence of truck driver who hit bus turning around in highway placed at 40% of $293,000 judgment); Lockett v. Board of Educ. for Sch. Dist. No. 189, 555 N.E.2d 1055 (Ill. App. Ct. 1990) (student 40% negligent in lowering bus window below stop-line in violation of state rules and therefore $110,000 judgment reduced by $44,000).

tend to scrutinize carefully apportionment of liability to school children.[125] However, in a non-comparative negligence state, any degree of negligence by the complaining party, no matter how small, will prevent recovery.[126] In states where contributory negligence is a complete bar to recovery, courts analyze closely the age of the child, as well as other factors surrounding the injury. In *Sharpe v. Quality Education, Inc.*,[127] an appeals court reversed a summary judgment for defendant bus company and held that a nine-year-old student "was not contributorily negligent as a matter of law."[128] The result in Sharpe was aided by the fact that the owner of a school bus failed to make necessary repairs even though the bus had a history of mechanical malfunctions, including stalling. After the bus stalled, the student was hit by a car while crossing a four-lane highway to make a phone call for help.

Self-Defense and Restraint

There are few legal areas that generate greater concern by citizens in general and educators in particular than the subject of self- defense. It is an area wherein resides considerable confusion regarding what the law permits individuals to do in defending their own persons. School personnel are generally concerned about what measures they can take in defending themselves if assaulted by a student or about what measures they can take in breaking up school fights. The dearth of reported cases regarding the use of self-defense in educational settings indicates either that school personnel exercise admirable self-control or that situations in which students are injured as a result of faculty self- defense do not result in student lawsuits against faculty members. The subject of self-defense raises three key questions: deadly force, retreat, and retaliation.

The term "deadly force" in self-defense does not necessarily imply that a fatality occurred. It rather indicates power in action, with or without the use of an instrument, which could, although does not necessarily have to, produce death.[129] The amount of force that can be used in a school setting depends upon the age of the pupil, the nature of the attacker's action necessitating defense, and the action of the one attacked after the initial attack has ceased. To be acting in self- defense, a person must not provoke the difficulty and there must be an impending peril without a convenient or reason-

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[125] *E.g.*, see Branch v. Stehr, 461 N.Y.S.2d 346 (N.Y. App. Div. 1983) (new trial awarded where jury apportioned 90 percent fault to six-year-old child).

[126] *See* Arnold v. Hayslett, 655 S.W.2d 941 (Tenn. 1983) (in non-comparative negligence state, negligence of 12-year-old student found to have been proximate or causative force in his own death and thus $40,000 award by trial court reversed).

[127] 296 S.E.2d 661 (N.C. Ct. App. 1982).

[128] *Id.* at 662.

[129] *Cf.* BLACK'S LAW DICTIONARY 773 (4th ed. 1961).

able means of escape.[130] The recommended policy of retreating from impending bodily harm before responding with deadly force may make sense in many social settings, but it is hardly applicable in a school setting in which teachers and administrators have a legal duty to supervise students.[131] Some states such as Minnesota have codified the use of reasonable force to encourage the exercise of that duty:

> Reasonable force may be used upon or toward the person of another . . . when used by a parent, guardian or teacher . . . in the exercise of lawful authority to restrain or correct such child or pupil.[132]

In this violent age when students may be using life-threatening weapons, the general rule is that defensive force may be used commensurate with the force of the attacker.[133] In order to justify the use of force on the grounds of self-defense it is not necessary to show that the use of force was required to protect from imminent personal injury. It is sufficient if the necessity was real or apparent.[134] But the mere belief of the persons attacked is not sufficient to justify the use of force.[135]

In situations other than those of self-defense, the possible harm to both the students who are fighting as well as to the spectators demands that a school official take some affirmative action in separating the students. In addition, teachers may find it necessary both to remove students who are causing disturbances in class and to remove non-students from the school setting.[136] That action may range from using a voice command toward the antagonists to using physical force toward one or both of the students. It

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[130] See McDonald v. Terrebonne Parish Sch. Bd., 253 So. 2d 558 (La. Ct. App. 1971) (smaller student who threw broom at larger pursuing student putting out the student's eye held to be reasonably acting in self-defense without using excessive violence). *Cf.* Hayes v. State, 142 So. 2d 675, 677 (Ala. 1930).

[131] Failure of a teacher to intervene to protect a student assaulted by another student can be the basis of a tort claim. Kim v. State of Haw., 616 P.2d 1376 (Haw. 1980), as well as a school official's failure to anticipate confrontations between students. Collins v. Wilson, 331 So. 2d 603 (La. 1976); Cammon v. Edwardsville Community Unit Sch. Dist. No. 7, 403 N.E. 2d 43 (Ill. App. Ct. 1980).

[132] MINN. STAT. ANN. § 609.06 (Supp. 1984).

[133] See Dixon v. Winston, 417 So. 2d 122 (La. Ct. App. 1982) (blow by male to female student's face causing blowout fracture of bone surrounding left eye was held reasonable where male reacted immediately to female quickly turning in her seat and striking him in side with a fork).

[134] See Landry v. Ascension Parish Sch. Bd., 415 So. 2d 473 (La. Ct. App. 1982) (criminal conviction reversed for teacher who fled from student attempting to hit him with two-by-four piece of wood and who held a handgun at his side, pointed toward the ground, because the student was considered at all times to be the aggressor and the teacher was acting in self-defense; in addition, teacher won civil suit to be reinstated to teaching position from which he had been terminated); Sims v. School Dist. No. 1, Multnomah, 508 P.2d 236 (Or. 1973) (jury verdict for teacher in civil case who sought to remove from classroom a disruptive student who physically resisted efforts to remove him from the room); Owens v. Commonwealth of Ky., 473 S.W.2d 827 (Ky. 1971) (criminal assault and battery conviction of teacher for using sneeze gun on students who had threatened her reversed and new trial ordered. "[w]hile we admit that the use

would be reasonable for school personnel to physically separate students by holding them or even physically pushing them apart, but there is no need for any school official to jeopardize his or her own physical safety or to wait until he or she is struck before responding with force.[147] However, it is not reasonable for a teacher to become an aggressor toward one of the fighting students or toward a student who assaults another student and then retreats. Once belligerents are separated or an attacker is disarmed or otherwise neutralized, the reasonable justification for physical force is gone. The existence of a discernible line between defense and aggression is a well-accepted rule.[148] Likewise the longstanding common law rule that a person coming to the defense of another steps into the shoes of the person he is assisting is generally accepted.[149]

As long as school personnel address themselves to physically separating fighting students or to resisting student attackers with the least force necessary, there should be no legal liability for injuries to the students. Likewise, there should be no reason why a student antagonist could not be physically held and escorted to the office if he or she refuses to go. It would be preferable to restrain antagonists who may represent threats to themselves or to others rather than to release them and risk serious injury to students or someone else.[150]

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of a weapon such as a squeeze gun is unusual and not to be encouraged; nevertheless, in this instance, threats of bodily harm being claimed, it may be justified."

[147] Germadus v. Sansser, 85 N.W. 946 (Minn. 1901); Boston v. Money, 233 P.2d 300 (Okla. 1951). See Frank v. Orleans Parish Sch. Bd., 195 So. 2d 451 (La. 1967) (court refused to accept self defense claim of 6'2", 230 pound physical education teacher who squeezed and shook a 49-101 pound boy, breaking his arm). Generally, provocative words are not considered to warrant physical retaliation. *But see* Thomas v. Carter, 114 So. 2d 736 (Miss. 1927) (provocative words justified physical defense).

[148] Generally, teacher use of force to remove disruptive students has been upheld. See *Sims*, *supra* note 134; People *ex rel.* Hogan v. Newton, 56 N.Y.S.2d 779 (N.Y. Sup. Ct. 1945). *But see* Williams v. Cotton, 346 So. 2d 1030 (Fla. Dist. Ct. App. 1977) (teacher found to have committed "negligent battery" for using excessive force in removing from classroom a 16-year-old unruly and boisterous student disturbing other students).

[149] Andreozzi v. Rubano, 141 A.2d 639 (Conn. 1958) (teacher's striking student with clenched fists and blocking door upheld); Willoughby v. Lehrkamp, 388 N.W.2d 688 (Mich. Ct. App. 1986) (teacher justified in applying full nelson to compel struggling student to go to office); People *ex rel.* Hogan v. Newton, 56 N.Y.S.2d 779 (N.Y. Sup. Ct. 1945) (teacher cleared of criminal charges of assault and battery resulting from scuffle when teacher sought to escort high school age boy using profanity off elementary school grounds).

[150] *Germadus*, *supra* note 135. See Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982) (school bus driver who held one of two boys fighting on bus, but boy being held was struck in eye by the other, was liable for injury to boy whom he was holding).

[151] See Minnesota v. Merdina, 25 Minn. 161 (1878). For a more recent case, see Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982) (school bus driver not entitled to governmental immunity [as was the school district] as result of holding one of students fighting on bus, thus permitting the other student to strike the student being held in the eye; complaint alleged that the student who struck the blow was the original aggressor in the altercation).

[152] See *Willoughby*, *supra* note 137.

Field Trips

Field trips are legally troublesome for educators because normal school responsibilities are exacerbated by new ones, such as heightened supervision due to the nature of the place visited or potential problems attendant to transportation. Field trips involve four areas with potential legal implications: instructions, supervision, transportation, and emergencies.

Even though it is doubtful that an elementary or secondary school could exculpate its legal liability by using the standard field trip forms,[41] such forms may be altered into information instruments. Field trip forms should focus upon furnishing as much information as possible to the parent or guardian signing the form rather than using the form to attempt to hold the school harmless in cases of negligence. A good field trip form should contain the following kinds of detailed information:

I. Description of Field Trip
(identify place to be visited, method of transport, type and time of supervision, time and place of departure and return).

II. Objectives of Field Trip
(describe objectives and how they may relate to coursework in school: tour factory and observe automation, assembly line for history class; hike along river or in mountains or along seashore to observe flowers, erosion, birds, fish, soil for science class).

III. Necessary Provisions, etc.
(lunch, extra set of clothes, sturdy shoes, money)

IV. Instructions to be given to students by Parent and Teachers
1. a place (e.g. river, factory) is dangerous;
2. obey the teacher or leader;
3. stay in the group (if required);
4. any further instructions the teacher wishes to include.

V. By signing the form, I (parent or guardian) certify that I request and give my permission for _____ to go on this field trip. I have given the instructions required above, and I release the teacher, principal and teacher from all liability and waive any claims against them.

_____
Parent Signature Date

[41] *See supra* notes 19-46 and accompanying text concerning exculpatory clauses.

The pivotal aspect of any field trip is undoubtedly the nature of supervision provided. Supervision includes not only the responsibility of adults on the trip toward the students, but the responsibility of the person in charge of the field trip to adequately instruct those adults doing the supervising. The number of adults to accompany a field trip depends upon the mental age of the students or other circumstances that may demand more adults. In *Foster v. Houston General Insurance Co.*,[142] one adult teacher accompanying eleven retarded students from a school to a gymnasium three blocks away was considered inadequate when a student was struck by a car and killed while crossing a street. In *Foster* two teachers were scheduled to accompany the students but one teacher was unable to because she was teaching a class, and so the other teacher was told to go on ahead. A total judgment of $65,000 for the student's death was directed against the two teachers only and not against the school district because of the teachers' failure to provide an adequate number of supervisory personnel. The *Foster* court did not indicate what constituted a satisfactory teacher-student ratio but did state that the teachers should have been interspersed among the students with at least one teacher available to stand in the street to be crossed and halt traffic.

In *Raleigh v. Independent School District No. 625*,[143] the St. Paul, Minnesota school district sponsored the bussing of 1200 high school students to a movie theater for the showing of the film "King" as part of Afro-American History week. The school district superintendent required a teacher-pupil ratio of 1:35. At the time of the field trip there had been racial tension at one of the St. Paul high schools. After the film, as students were departing the theater, a white student had her purse stolen and her arm slashed. The *Raleigh* court, upholding a verdict against the school district, noted that the district is not liable for sudden, unanticipated misconduct of fellow students, but it is liable for sudden foreseeable misconduct which probably would have been prevented had a teacher been present. School district liability was based upon the knowledge of racial tension plus lack of supervision and organization at the theater.

Liability problems can also be encountered in field trip situations where special training should have been provided in anticipation of potential dangers. In the leading case involving field trips, *Cox v. Barnes*,[144] an eighteen-year-old high school senior drowned at a beach while on a one-day senior

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[142] 407 So. 2d 759 (La. Ct. App. 1981).

[143] 273 N.W.2d 572 (Minn. 1978). The jury instruction on foreseeability was: "It is the duty of the school to use ordinary care and to protect its students from injury resulting from circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care. There is no requirement of constant supervision of all the movements of all pupils at all times."

[144] 469 S.W.2d 61 (Ky. 1971).

outing. Prior to approving the field trip, the school principal told the seniors that swimming would be permitted only if they furnished their own lifeguard. They asked the physical education director who was an excellent swimmer to accompany them, which he did. The student drowned while attempting to swim toward a diving tank approximately forty yards from shore on which was attached a sign, "Off Limits". The alleged acts of negligence by the two adults accompanying the field trip were as follows: permitting students to enter the water within one hour after lunch, violation of signs regarding swimming at one's risk, failure to check water conditions, permitting students to swim in cold water in street clothes, failure to have lifesaving equipment available, and failure to sit in the lifesaving stands. The court refused to find the teachers or school district liable, and unquestionably, the requirement by the principal that a lifeguard accompany the field trip was a deciding factor. Additionally, the age of the students was a factor because a eighteen-year-old was considered old enough to read and obey signs. A similar result was reached in *Morrison v. Community Unit School District No. 1*[145] where a fifteen-year-old student drowned in a swimming pool. Courts appear willing to find that older students should be more likely to appreciate risks associated with certain activities and thus require less direct supervision.[146] Where students on field trips are injured or killed by the intentional acts of another person, whether or not a student appears to be immaterial, the courts seem to be willing to find school personnel and the schools not liable because of the intervening intentional cause.[147]

Whether the owners of the situs of the field are liable for injuries to students on field trips often depends upon whether the students are considered to be licensees or invitees. Usually school personnel request permission to visit a place and thus students are considered to be licensees with the situs owner responsible only to warn or make safe dangerous conditions known to him.[148] However, if the students are present at a situs at the invitation of the owner the duty of the owner is to warn or make safe dangerous conditions of which he knows or should have known.[149] In an interesting set of facts even former students can be invitees when returning to their school. In *School Board of Palm Beach v. Anderson*,[150] a former student who was killed when

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[145] 358 N.E.2d 389 (Ill. App. Ct. 1976).

[146] Moore v. Drummet, 478 S.W.2d 177 (Tex. Civ. App. 1972) (15-year-old falling off horse); Arnold v. Hafling, 474 P.2d 638 (Colo. 1970) (high school student pushed by another student).

[147] Mancha v. Field Museum of Natural History, 283 N.E.2d 899 (Ill. App. Ct. 1972); Sharp v. Fairbanks N. Star Borough, 569 P.2d 178 (Alaska 1971).

[148] Hudgins & Vacca, *supra* note 78 at 97; Connors, *supra* note 67 at 56.

[149] In Nunez v. Isidore Newman High Sch., 306 So. 2d 475 (La. App. Ct. 1975) the invitee standard is stated: "An owner or occupier of lands or buildings must take reasonable and ordinary care to protect invitees from any dangerous conditions on the premises and inspect the premises for any possible dangerous conditions of which he does not know."

[150] 411 So. 2d 940 (Fla. Dist. Ct. App. 1982).

he returned to get his records generated liability for the school. The presence of the student in the building for a legitimate function plus knowledge of racial disturbances in the school were sufficient notice to school officials to keep the premises safe. As a result of the licensee- invitee distinction it would be better for students to be invited to the situs of the field trip, but as a practical matter most field trips would never take place if schools waited for invitations. Thus the most effective supervisory strategy is proper instruction to those participating in the field trip regarding anticipated hazards and safety rules.[151]

The problem of transporting students on field trips is a never-ending source of concern to school officials. While school buses or common carriers would be preferable, such means of transportation are not always available, practical, or financially feasible. Where students provide their own transportation in private cars, the concern for the school is whether the drivers will be considered to be agents of the school. The creation of an agency will depend upon a number of variables: whether a private car was used with the permission and for the convenience of the school, whether such use was a standard school practice, whether the function for which the car was used was a sanctioned school activity and whether the school reimbursed the driver for expenses.

In *Caston v. Buckeye Union Insurance Co.*,[152] an injured student was able to satisfy the bulk of his $314,650 judgment against the school's insurer because the private car in which the student was injured was considered to be a "hired automobile." Two factors appeared to satisfy the court that this car was a "hired automobile." First, the car was being used as a substitute vehicle for the school buses which were not available for the field trip; and second, the school official had made a request for volunteer drivers. But the fact that students use their own cars to get to school-sponsored activities should not, in itself, create an agency relationship for the school.[153] However, if school transportation is provided by the school and an exception is made for one student, the result can be different.[154] Even an unauthorized use of a car for a field trip can create school liability if it can be shown

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[151] Obviously safety rules need to take into consideration the nature of the hazards plus the age of the students. As the mental age decreases mere verbal instructions for a first-time trip without adequate supervisory personnel may not be enough. *Cf. Foster, supra* note 87 (verbal warning to mentally handicapped walking three blocks to gym for first time not adequate) *with* Patterson v. Orleans Parish Sch. Bd., 461 So. 2d 386 (La. Ct. App. 1984) (verbal warning about keeping fingers out of door plus orderly procedure in taking students to bathroom was adequate for first grader).

[152] 456 N.E.2d 1270 (Ohio Ct. App. 1982).

[153] *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Rauls v. Dugas, 398 So. 2d 630 (La. 1981) (students driving own cars on function related to school did not generate liability). *See also Foster, supra* note 87 (although teachers liable for lack of supervision, refusal of school to provide bus transportation did not make school liable).

[154] Williamson v. Board of Educ. of Berne-Knox, 375 N.Y.S.2d 221 (N.Y. 1975).

that the school had knowledge of the unauthorized use.[155] Because of the likelihood that high school students would prefer to drive their own cars to off-campus activities, a school should warn all drivers regarding the importance both of having adequate liability insurance and of ascertaining whether there are any policy limitations on liability coverage. As often as possible schools should provide transportation and make the use of that transportation mandatory.

Arguably the legal status of student use of private automobiles for field trips is similar to the use of student cars to travel from one campus to another or from campus to a work site. In *Richards v. Hambright*,[156] a South Carolina vocational center adopted a driving/riding policy which required parental permission before students could be permitted to drive or ride in cars from the high school to the vocational center rather than use the bus provided by the school district. Even though the school district officials had failed to check parental permission passes the week that a student was injured in an automobile accident, the state supreme court upheld dismissal of the injured student's suit against the school district. Failure to check passes was not considered gross negligence, therefore governmental immunity was not waived. But *Richards* raises the question of whether or not the absence of a school driving policy might in itself be a basis for liability. However, a Pennsylvania court in *Capuzzi v. Heller*,[157] suggested that absence of such a policy would not prevent judgment in favor of the school district. In *Capuzzi*, students injured as a result of two uninsured vo-tech students racing in their cars between the high school and the vo-tech school alleged school district governmental waiver under "negligent entrustment" or "employee" theories.[158] In denying recovery, the school district found that the power of the school district to refuse students the ability to drive cars did not equate to negligently entrusting the students' own cars to themselves and that the lack of any control by the school district over student operation of their cars obviated any employment relationship. Because of the governmental immunity component, neither the *Richards* nor *Capuzzi* cases are directly applicable to nonpublic schools. But *Richards* seems to indicate that a school policy requiring parental release before an automobile is used to transport students may be in the school's best interest. Such a policy may mean that the parent's insurer would become the primary insurer in the event of an accident and that parents who sign the permission forms could be denied damages recovery in their own names.

One of the options for field trips that schools are increasingly considering is the leasing or rental of cars or vans. A recent case highlights the legal

[155] Sumter County v. Pritchett, 186 S.E.2d 798 (S.C. 1971).
[156] 374 S.E.2d 296 (S.C. 1988).
[157] 558 A.2d 596 (Pa. Commw. Ct. 1989).
[158] *See* PA. STAT. ANN. tit. 42 § 8501 *et seq.* (1982).

problems with such an option. In *Whittington v. Sowela Technical Institute*,[159] a plaintiff recovered a judgement in excess of $300,000 on behalf of himself and his minor son for the death of his wife, a student at the institute, against the defendant school and its insurer when insurance coverage of the rental company was limited to $10,000. The field trip on which the student was killed was mandatory for all students, the students received academic credit, and the van was driven by two accompanying instructors. The court predicated liability on the school's failure in its "duty . . . to provide a driver qualified and trained in transporting a large group of students over a long distance on a heavily traveled interstate highway."[160] *Whittington* is a troublesome case because two of the most common reasons for using rental cars and vans are to eliminate the high cost of professional licensed drivers and to pass on the insurance risk to the rentor's insurer.

Whittington is a helpful precedent to use in dispelling the notion that schools can eliminate liability for field trips by classifying them as "joint ventures." In this case, the school district argued that it should not be liable because the district and the students were engaged in a joint venture. However, the court dispensed with the argument by declaring that the facts of this case did not fit the definition of a joint venture.

> A joint venture is an undertaking by two or more persons to combine their property, capital, labor, or skill in any combination of these elements in the conduct of a particular line of trade of general business for joint profits, thus creating the status of a partnership, although the facts do not show a formal partnership.[161]

How schools should prepare for and handle emergencies on field trips is a subject that does not get much attention. A frequent question is what to do with the flagrantly disobedient or unruly student on a field trip. The problem is obviously exacerbated if the trip is for several days. A student should be sent home only as an absolute last resort and then only if the parent has consented in writing in advance to pay for the cost of such a return, a common carrier is used, and the parent is phoned prior to placing the student on the common carrier. The risks associated with such a problem area have unquestionably contributed to many schools prohibiting field trips which last longer than one day. Obviously some emergencies can be anticipated and planned for. It could be negligent for school personnel to not take a first aid kit on a field trip, especially if the trip is to a place removed from hospitals or fire departments. First aid equipment and accompanying trained personnel need to be taken on a field trip commensurate with the nature of

[159] 438 So. 2d 236 (La. Ct. App. 1983).
[160] *Id.* at 247.
[161] *Id.* at 246.

the trip. It would probably be negligent for school personnel not to have a trained lifeguard at a swimming activity, a snakebite kit on a hike through a rocky or marshy area, or a stretcher, splints, and an accomplished guide on a hike through mountainous terrain.

Medical Needs

A school's responsibility to meet the medical needs of students has been a persistent problem area. The problem has been heightened by the Individuals with Disabilities Education Act (IDEA)[162] which requires schools to perform certain health related services "to assist a handicapped child to benefit from special education."[163] Such health related services, which must be furnished or paid for by public schools, have been found to include psychotherapy,[164] catheterization,[165] maintenance of a tracheotomy tube,[166] and a climate controlled classroom.[167] Although IDEA does not apply directly to nonpublic schools, the services mandated under that Act provide definition to the ways in which student medical needs can be met without violating tort liability standards[168] or state statutes punishing the unauthorized practice of medicine.[169]

Basically, school officials are expected to act only as reasonable and prudent persons to contact medical help when they receive knowledge that a student needs such attention.[170] The obligations can be extended to notify a child's parents of medical problems needing treatment.[171] Unless specifi-

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[162] 20 U.S.C. § 1401 et seq.

[163] 20 U.S.C. § 1401.

[164] Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

[165] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

[166] Department of Educ., State of Haw. v. Katherine D., 727 F.2d 809 (9th Cir. 1984).

[167] Espino v. Besterio, 520 F. Supp. 905 (S.D. Tex. 1981).

[168] *See* Greening v. School Dist. of Mallard, 393 N.W.2d 51 (Neb. 1986) (negligence claim denied for lack of proximate cause even though EHA [IDEA] services [physical therapy] were performed by an unlicensed employee).

[169] *See* Fearen, *Catheterization — School District Mandates Are Expanded Under 94-142*, 3 Educ. L. Rep. 803 (1982). *See also* People v. Shokunbi, 232 N.E.2d 226 (Ill. App. Ct. 1967) (person who claimed to be naturopathician not involved in practicing medicine without a license where his claims of treatment and cures not directed toward the public).

[170] Mogabgab v. Orleans Parish Sch. Bd., 239 So. 2d 456 (La. Ct. App. 1970) (delay by coaches in calling a doctor created liability); Peck v. Board of Educ. of City of Mt. Vernon, 317 N.Y.S.2d 919 (N.Y. 1970) (refusal to excuse heat stroke victim from practice created liability). *See also* Klemkuechel v. Gettysburg College, 980 F.2d 1360 (3d Cir. 1993) (college liable for failure to have trainer at fall semester lacrosse practice even though lacrosse is spring competition sport).

[171] Savino v. Board of Educ. of Sch. Dist. No. 1, 506 N.Y.S.2d 210 (N.Y. App. Div. 1986) (parent had cause of action for negligence where school district with knowledge that child's psychological problems would worsen if left untreated failed or refused to notify parent).

cally trained to do so, school officials are not expected to go beyond administering lifesaving first aid,[172] but they will be liable for excessive treatment.[173]

Concern about proliferation of drug use on campus has prompted some schools to require student medications to be kept in the office. A school would normally have no responsibility to monitor the dosage or timeliness of administration of medications where the students carry the medications with them; however, where the school office has control of the medications it may be incumbent upon school officials to notify students if they fail to appear at the office on time to take their medications, and possibly to even supervise the accuracy of the dosages. Although there are as of yet no cases in this area, it may be a good practice for nonpublic schools to either allow students to carry their own medications along with a central office permission slip issued on a daily basis or to keep medications in the office and have parents sign a release, excusing the school from any responsibility to contact students to come to the office to take medications and to monitor dosages. Although such a narrowly drawn advance release may well be an enforceable exculpatory clause,[174] it would seem that the increased risk of liability for the school is not worth a rule directing medications to be kept in the office.[175]

The administration of injections or medical procedures are generally governed by state laws prohibiting the unauthorized practice of medicine.[176] Such medical practices should be handled only by properly licensed nurses under a doctor's direction, unless state law provides otherwise.[177] The determination of what are medical/nursing practices is still a somewhat ambiguous area. In *Irving Independent School District v. Tatro*,[178] the court of appeals had decided that administration of CIC to a student by school personnel, such as teachers or teacher aides, pursuant to an IEP under the IDEA did not violate the Texas Medical Practice Act.[179] The supreme court's acknowledgement that CIC was a "supportive service" rather than a "medical service" under IDEA and that the service could be "performed by a nurse or other qualified person"[180] answered the question as to whether

[172] H. ARENSZEILER, ATHLETICS AND THE LAW 208 (1975).

[173] Welch v. Dunsmuir Joint Union High Sch. Dist., 326 P.2d 663 (Cal. 1958) (coach allowed a student to move an injured player off the field thus aggravating the injury).

[174] A nonpublic school would have to decide what to do if parents insisted that their student be allowed to carry his own medications and refused to sign the release. It hardly seems worth losing a student when that prospect is weighed against the ambiguous appearance of illicit drug-taking.

[175] *See* Bertens v. Stewart, 453 So. 2d 92 (Fla. Dist. Ct. App. 1984) (public school rule prohibiting students from personally possessing "medicine" and requiring that "medicine" be left with designated school staff member was violative of due process as applied to fifth grader who had been suspended for bringing three vitamin pills to school and giving two of them to another student).

[176] *E.g.*, *see* VA. CODE ANN. § 54.1-2902 (1991).

[177] *E.g.*, *see* VA. CODE ANN. § 54.1-2901 (1991).

[178] 104 S. Ct. 3371 (1984).

[179] Tatro v. Texas, 703 F.2d 823, 828 (5th Cir. 1983).

[180] *Tatro*, 104 S. Ct. at 3379.

the service was required under IDEA, but not the broader question as to how this service should be provided if another state other than Texas considers CIC to be a medical function for purposes of the practice of medicine/nursing. Where state statute describes the practice of nursing as "administering medications, treatments, and executing regimens prescribed by licensed physicians, dentists, and podiatrists,"[181] the administration of even such services as CIC by persons who are not nurses could be considered the unauthorized practice of nursing.[182] If nursing practice is extended to include all acts "requiring substantial judgment and specialized skills,"[183] then a broad range of services required under IDEA, such as CIC[184] or suctioning a tracheostomy tube, might be considered to be the practice of nursing.[185] If services required under IDEA are considered to be medical/nursing services under state law, the next, and yet unaddressed question, is whether IDEA might be regarded as preempting state law and prohibiting enforcement of medical/nursing statutes as to "related services." More likely, courts would simply require school districts to provide whatever support personnel are necessary, regardless of the cost.

The problem of medical procedures goes beyond prescriptive medications and procedures and can even extend to the classroom. In a related case, a college biology teacher permitted students to take blood samples from each other for a class experiment.[186] The blood was extracted while the students were sitting or standing. After extracting blood from one student, the plaintiff fell forward breaking six teeth. The injured student successfully sued the professor and the school. The standard of care to which the professor was held is well worth noting. The court observed that a college professor who

> approves and undertakes to supervise a project which includes the performance of a medical function such as the withdrawal of blood from volunteer students . . . owes a duty to the volunteer

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[181] OHIO REV. CODE ANN. § 4723.02 B (Baldwin 1994).

[182] In Ohio, the penalty for unauthorized practice of nursing is a fine of $500 or imprisonment of not more than 90 days. OHIO REV. CODE ANN. § 4723.99 (Baldwin 1994). The only exception permitted on a trial basis was "the transfer of responsibility for the performance of a selected nursing activity or task from a licensed nurse to a trained unlicensed person working under nursing supervision in a selected situation [in a Mental Retardation/Developmentally Disabled county board facility]." OHIO ADMIN. CODE § 4723-21-01 B.

[183] Ohio Board of Nursing, *Statement on Selected Activities of Nursing Assessment*, Prac-1008, Jan. 21, 1983.

[184] See Ohio Board of Nursing, *Statement on Catheter Maintenance*, Prac-1011, June 6, 1986 ("The procedures [regarding the maintenance of catheters] should only be performed by nurses who are specially trained.")

[185] See Ohio Board of Nursing, Statement on Protocols, *Standing Orders and Preprinted Orders*, Prac-1007, April 24, 1986 (standing orders, which include life threatening as well as non-life threatening situations, are appropriate for nurses to implement).

[186] Butler v. Louisiana State Bd. of Educ., 331 So. 2d 912 (La. Ct. App. 1976).

> patient or blood donor to see that the same precautions are taken for the safety and well-being of that patient as would be taken by licensed medical doctors in that locality.

All schools would be advised to have only properly licensed personnel perform medical procedures or, in the case of certain simple class experiments, such as taking blood samples, they would ascertain from a local medical doctor what standard safety procedures exist prior to the experiment.

A final medication problem that has been a frequent source of concern among school officials involves the dispensing of over-the-counter medications, such as aspirin or antiacids, by personnel in the school office.[187] Nonpublic schools have responded in one of three ways to this problem area: absolute prohibition of dispensing any over-the-counter medications by the school; dispensing over-the-counter medications in reasonable amounts to any student who requests them; and dispensing such medications to a student only if the school has written or oral parental permission. The absence of any reported cases in this area probably reflects the low risks involved with dispensing over-the-counter medications. Nonetheless, the low risk of liability from unverified dispensing of such medications needs to be balanced against unnecessary student discomfiture because of, for example, a school's adamant refusal to give a student two aspirin.[188] There seems to be little reason why such medications should not be made available to students, provided that the school has first received parental permission orally or in writing. A simple phone call to a parent or guardian plus a notation in a school log book should the student desire the same medication in the future would seem to be an adequate compromise.

Defamation

No area of law evokes the range of human emotions as does the area of written and spoken defamation in which indignant plaintiffs often allege a multitude of real and imagined injuries. Increased access by students and school employees to their records has made defamation a genuine concern to those responsible for evaluating students and employees. Although school employees, including administrators, often believe that they have been defamed and may even threaten legal action, it must be remembered

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[187] This discussion of over-the-counter medications assumes that there is no emergency situation, in which case use of such medications, e.g., ointments, disinfectants, would probably be required under a "reasonable person" standard. See Mogabgab v. Orleans Parish Sch. Bd., 239 So. 2d 456 (La. Ct. App. 1970).

[188] See S. Thomas, Health Related Issues in Education 34 (NOLPE 1987) (author's assertion that even over-the-counter medications need written parent [and possibly physician] authorization do not seem to be supported by author's citations referring to parental consent for surgical operations and physician incorrectly giving a prescription drug).

that defamation is a very difficult cause of action to prove in court. Any person maintaining a defamation cause of action must overcome a formidable number of defenses, particularly truth, qualified privilege, consent, and in some cases, "public figure."

At common law, libel was regarded as more serious than slander, and to some extent, this distinction is still maintained.[189] However, the more enlightened position in the electronic age involves both treating libel and slander as equivalents and requiring a plaintiff to prove that an untrue published statement to a third party not privileged to receive it resulted in injury, except in four categories:

> (1) Words that impute the commission of a criminal offense;
>
> (2) Words that impute infection of a communicable disease of any kind that would tend to exclude from society;
>
> (3) Words that impute inability to perform or express lack of integrity in the discharge of duties of office or employment;
>
> (4) Words that prejudice a particular person in his profession or trade.[190]

In the above four categories, a plaintiff must prove that a statement is untrue and that there was a publication of the defamatory material to a non-privileged third party but he or she need not prove special damages. To be actionable at all, allegedly defamatory remarks must be "more than unpleasant and offensive."[191]

Employees of public institutions have some protection under the liberty clause of the fourteenth amendment, a protection that is not be available to employees of nonpublic institutions. In the seminal case of *Board of Regents v. Roth*,[192] the United States Supreme Court observed that an employee who had been stigmatized through an employment decision was entitled to a

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[189] See M. Appleman, *supra* note 48 at 378. For an example of a case where a court in a state that has abolished distinctions between libel and slander still appeared to maintain some vestige of distinction, see Stanley v. Taylor, 278 N.E.2d 824 (Ill. App. Ct. 1982).

[190] See M. Appleman, *supra* note 48 at 381. To these four categories some jurisdictions would add a fifth: unchastity to a woman. See W. Prosser, Law of Torts 760 (4th ed. 1971).

[191] Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. App. 1984), *after remand* 547 A.2d 144 (D.C. App. 1988) (statement that dean of college was "actively opposed to the present administration" not actionable); Harris v. School Annual Publication Co., 466 So. 2d 963 (Ala. 1985) (no defamation where teacher who declined to have her picture taken for yearbook found, in place where picture would have been, a cartoon of monkey sitting on a swing with caption at side "munching out" and teacher's name and grade underneath); Avins v. Moll, 774 F.2d 1150 (E.D. Pa. 1984) (former dean was "nothing" to the law school held not actionable).

[192] 408 U.S. 564 (1979).

name-clearing hearing. However, alleging sufficient facts to establish a liberty interest violation is a formidable task. In *Meyer v. University of Washington*,[193] a departmental reprimand to a faculty member which allegedly caused his estrangement from his colleagues (and thus a damaged reputation) failed to state a liberty interest violation because affidavits of his colleagues indicated no effect from the reprimand. In *Harris v. Arizona Board of Regents*,[194] allegations of poor performance or inability to get along with other faculty were insufficient. In *Garcia v. Jackson*,[195] a university department head was not deprived of a liberty interest either from a rumor circulated in his department regarding his removal or from a provost's statement in the student newspaper that nonrenewal was in the department's best interest. However, depending on the facts, a name- clearing hearing may be required. In *Kramer v. Horton*,[196] a tenured music professor, whose contract included teaching and performance with a faculty quintet, was found to be entitled to a name-clearing due process hearing when he was removed as a member of the quintet. The following reasons were identified by the court as affecting his reputation: (1) while the university had not published plaintiff-faculty member's removal, the music faculty was close-knit and rumor had circulated for two years prior to plaintiff's removal; (2) other member's of the quintet had met with the dean for two years to complain about plaintiff without providing him notice; (3) a replacement oboist had been chosen and hired without giving plaintiff an opportunity to rebut charges against him; (4) testimony from professional musicians indicated that plaintiff's employability as a performing chamber musician had been partially damaged by his removal.

Truth is always a complete defense to defamation and it is open for discussion under federal and some state constitutions as to whether the motive of the person making the statements should make any difference.[197] Even

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[193] 719 P.2d 98 (Wash. 1986)

[194] 528 F. Supp. 987 (D. Ariz. 1981)

[195] 845 F.2d 647 (6th Cir. 1988)

[196] 371 N.W.2d 801 (Wis. Ct. App. 1985)

[197] See, e.g., Delis v. Sepsis, 292 N.E.2d 138 (Ill. App. Ct. 1972); Prosser, *supra* note 190 at 796. In light of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) it is doubtful under the first amendment freedom of speech protections that good motivation mitigates a defense of truth. The ILL. CONST., art. I § 4, would appear to increase a defendant's burden in libel trials: "all persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." In Foote v. Saralvan, 432 So. 2d 877 (La. Ct. App. 1983) false charges of "deceit of the university" and "false pretenses" were harsh but not so unfair as to create liability. However, a justifiable case of action was presented as to the good faith of a statement to a tenure committee that a faculty member being considered for tenure mismanaged funds, plagiarized research and violated professional ethics. Goodman v. Gallerano, 695 S.W.2d 286 (Tex. Ct. App. 1985)

where the absence of malice may appear to be a requirement for a defense of truth, a jurisdiction may undercut the requirement with a rule of innocent construction.[198] There invariably questions by students and school personnel as to whether or not written or oral statements are defamatory if they do not declare the entire truth. Essentially two kinds of concerns are raised: whether substantially correct statements are defamatory and whether statements that relate the negative but not the positive are defamatory. There appears to be some support for the proposition that statements need be only substantially correct with no requirement for word-for-word accuracy,[199] but of course the more summary and conclusive the statement, the greater the risk of defamation.[200] Regarding the second kind of concern, there does not appear to be a requirement that statements balance positive and negative elements in order to be true. In *Hett v. Ploetz*,[201] a school district superintendent who had given a favorable recommendation for a teacher to secure a permanent teacher's license and who had encouraged the teacher to resign because he did not want to dismiss the teacher, did not act in bad faith when he later wrote an essentially negative letter of recommendation to another school superintendent to whom the teacher had applied to teach. In a more recent case, the defamation complaint against a book publisher of a private liberal arts college[202] was dismissed when the following statement was published:

> Sex, drugs, and booze are the staples of life . . . Sex is casual, and formal dating is unheard of; the pickup scene thrives in Ithaca . . . the use of pot is a foregone conclusion, and cocaine occasionally manages to send its way into the hands of those who can afford it. Speed and downers are common . . . .

The court never had to address the actual question of the truth of the statement because it determined that the statement was not defamatory to the reputation of the college and the college failed to prove special damages.

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[198] For an application of the rule see Valentine v. North Am. Co. Life & Health Ins., 328 N.E.2d 265 (Ill. 1974) where termination of an employee because "he was a lousy agent" was construed innocently to mean a generally unsatisfactory agency relationship existed. *See also*, McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985) (statement that faculty member's refusal to teach a class constituted neglect of professional duties was an opinion only and not actionable); Bellivcau v. Rerick, 504 A.2d 1350 (R.I. 1986) (statement that only one of faculty member's listed publications was a "published" one was opinion only and not actionable).

[199] Wilson v. United Press Ass'n, 98 N.E.2d 391 (Ill. 1951); Ft. South Press Co. v. Davis, 96 S.W.2d 416 (Tex. Civ. Ct. App. 1936). *See also* Bookout v. Griffin, 639 P.2d 1190 (N.M. 1982). In Foote v. Saralvan, 432 So. 2d 877 (La. Ct. App. 1983) a false charge of payroll fraud was not actionable in defamation because the crime was unsupportable by the evidence.

[200] The vagaries of the use of conclusive language are illustrated by two cases where it was actionable to write of a minister, "I would not have anything to do with him or touch him with a ten foot pole." Cole v. Millspaugh, 126 N.W. 626 (Minn. 1910) but it was not actionable to call a lawyer a "bum in a gin mill." Wendberg v. La Guardia, 10 N.Y.S.2d 445 (N.Y. Sup. Ct. 1939).

[201] 121 N.W.2d 270 (Wis. 1963).

[202] Ithaca College v. Yale Daily News Publishing Co., 445 N.Y.S.2d 621 (N.Y. App. Div. 1981).

Even if students or school personnel can prove that a statement is not true, they must prove that the untruth was published to a third person who was not privileged to receive it.[203] Untrue statements made directly to the involved party are not defamatory, but if the statement is overheard by a third party who is not privileged to know the statement then there has been a publication.[204] A publication normally occurs only if the statement is made by the defendant so that a plaintiff's republication would not meet the requirement. However, there is some indication that a republication by a minor child may constitute a publication for defamation purposes, presumably because it could be foreseen that a minor child would tell his parents or friends about any untrue statements.[205] Thus it would be wise for nonpublic school officials to be aware of making unfounded charges against minor children, especially if the charges involve one of the four categories mentioned earlier which do not require proof of special damages, e.g., sale or use of narcotics, venereal disease, theft, extortion, assault.

A publication has not occurred if statements, albeit untrue, are available only to school personnel directly who are involved with the student or employee who are thus considered qualified to have access to the information in the statements. Normally this privileged group (hence the term "qualified privilege") for a student would include the student's classroom teacher(s), counselor, school administrator(s), and, in relevant cases, the school board members, school nurse, psychologist, social worker, or other learning specialists.[206] A qualified privilege has even been extended to include an oral communication to a law school to cancel an applicant's test scores.[207] As for employees, revelations of suspected wrongdoing to supervisory personnel[208] or to a disciplinary or evaluation committee[209] within an organization are clothed with a qualified privilege. Likewise, letters of rec-

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[203] The question of the point in time of publication is important because it begins the running of the statute of limitations. *See* C. F. Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, Ill. B. J. 326, 330 (Feb. 1976).

[204] Untrue statements dictated to secretaries appear to be a publication, but the cases are older. Bickbel v. Grafton Deaconness Hosp., 23 N.W.2d 247 (N.D. 1946); Ostrowe v. Lee, 175 N.E. 505 (N.Y. 1931).

[205] *See* Davis v. Askins's Retail Stores, 191 S.E. 33 (N.C. 1937).

[206] Federal and state privacy acts appear to be broad enough to permit access by school officials with "legitimate educational interests" to information about a student and thus fall within the "qualified privilege" defense of tort liability. *See* 20 U.S.C. § 1232(g) and 45 C.F.R. § 99.30(a). *Cf.* Brown v. McConn, 138 S.E. 247 (Ga. Ct. App. 1927).

[207] Johnson v. Educational Testing Serv., 615 F. Supp. 633 (D. Mass. 1984).

[208] Jerolamon v. Farleigh Dickinson Univ., 448 A.2d 1064 (N.J. Super. App. Div. 1985) (security report sent to Provost held to be within privilege); Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986) (memo by faculty critical of department chairman sent to Vice President of Academic Affairs held to be within privilege).

[209] Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986); Scarpelli v. Jones, 626 P.2d 1190 (N.M. 1982); Small v. McRae, 651 P.2d 982 (Mont. 1982); Colson v. Stieg, 433 N.E.2d 246 (Ill. App. Ct. 1982); McGowen v. Prentice, 341 So. 2d 55 (La. Ct. App. 1976).

commendation that are part of an employment or admissions procedure have a qualified privilege.[210] Comments by parents to school boards regarding teachers or letters to principals are generally covered by a qualified privilege.[211] However, the protection of the qualified privilege is lost if plaintiff can prove the untrue statements, even though made only among a privileged group, were said with malice or reckless disregard for the truth.[212]

In *New York Times Co. v. Sullivan*,[213] the United States Supreme Court declared that untrue statements about "public officials" (later extended to include "public figures"[214]) were not actionable unless there was proof of actual malice. Just who public officials or figures are appears to depend on state law and has been extended to a wide range of school personnel in the public sector.[215] *The New York Times* privilege does not apply to cases involving private citizens,[216] but a state can make the public-private distinction difficult to discern when a public official includes anyone who is

> carrying out a function of government or (who) is participating in acts relating to matters in which government has a substantial interest.[217]

Since the identification of a person as a "public figure" can affect a plaintiff's recovery for alleged defamation, an important legal determination is whether or not the plaintiff is a public figure. A person in a nonpublic setting can acquire such a status by projecting him or herself into the public spotlight. For example, in *Hustler Magazine v. Falwell*,[218] The United States Supreme Court found that because Jerry Falwell was in the public spotlight because of his media and political activities, he could not recover in defamation without proof of actual malice. In *Walko v. Kean College*,[219] a

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[210] Manguso v. Oceanside Unified Sch. Dist., 200 Cal. Rptr. 535 (Cal. Ct. App. 1984); Hett v. Ploetz, 121 N.W.2d 270 (Wis. 1963); Burdett v. Hines, 87 So. 470 (Miss. 1921); Lattimore v. Tyler Commercial College, 24 S.W.2d 361 (Tex. Comm'n App. 1930).

[211] Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984) (statements to school board); Swenson-Davis v. Martel, 354 N.W.2d 288 (Mich. Ct. App. 1984) (letter to principal); Zuber v. Bordier, 522 N.Y.S.2d 610 (N.Y. App. Div. 1987) (letter to principal and conference with parent, student and teacher).

[212] Vinson v. Linmar Community Sch. Dist., 360 N.W.2d 108 (Ia. 1984) (statements that bus driver had falsified time card held actionable); Welch v. Chicago Tribune Co., 340 N.E.2d 539 (Ill. App. Ct. 1975); Farrell v. Kramer, 193 A.2d 560 (Me. 1963).

[213] 376 U.S. 254 (1964).

[214] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[215] State v. Deffey, 395 So. 2d 759 (La. 1981) (school superintendent and school supervisor); Kapiloff v. Dunn, 343 A.2d 25 (Md. 1975) (high school principal); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (wrestling coach); Sewell v. Brook Bank, 581 P.2d 267 (Ariz. 1978) (classroom teacher); Gallman v. Carnes, 497 S.W.2d 47 (Ark. 1973) (assistant dean and professor of law); Byers v. Southeastern Newspaper Corp., 288 S.E.2d 698 (Ga. Ct. App. 1982) (dean).

[216] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[217] Doctors Convalescent Center, Inc. v. East Shore Newspapers, 244 N.E.2d 373 (Ill. App. Ct. 1968) (medical personnel in a private nursing home).

[218] 485 U.S. 46 (1988).

[219] 561 A.2d 680 (N.J. Super. Ct. Law Div. 1988).

New Jersey court applied the concept of limited purpose public figure in denying recovery for alleged defamation to a person serving as an Assistant to the Dean of Education and as an instructor. A limited purpose public figure is defined in terms of a particular issue and the status limited purpose public figure applies only when the publication in controversy concerns that issue. In Walko, plaintiff's role at the College involved her in the controversy regarding the use of a hotline to answer student questions that had been parodied by students in the campus newspaper as "Whoreline." Even though plaintiff alleged that she had suffered damages as a result of the parody, she was not able to recover without proof of actual malice. However, as a general rule, since it is questionable whether nonpublic school personnel are public figures, it should not be assumed that statements made about such personnel will be protected under a public figure defense.

Under certain circumstances, some kinds of revelations may enjoy an absolute privilege. No cause of action, therefore will be viable, even if proof of actual malice is made. In *Rothman v. Emory University*,[220] contents of a letter from a law school dean to the Illinois Board of Law Examiners was absolutely privileged because the Board served a quasi-judicial function, even though the letter made reference to a student's hostility and disability. However, despite the fact that the letter was absolutely privileged as to its contents, the student nonetheless had claims under the Rehabilitation Act (section 504) and the Americans with Disabilities Act (ADA) because the dean had refused to certify the student to the Board, and the dean had created a hostile environment concerning the student's disability.

Historically, courts have protected statements which were considered to be opinion.[221] However, if statements offered as opinion imply facts capable of defamatory meaning, a cause of action for defamation may be stated.[222] More recently, the U.S. Supreme Court in *Milkovich v. Lorain Journal Co.*[223] cast some doubt on protection for statements of opinion. In

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[220] 828 F. Supp. 537 (N.D. Ill. 1993).

[221] *E.g.*, see Epstein v. Board of Trustees of Dowling College, 543 N.Y.S.2d 691 (N.Y. App. Div. 1989) (letter to editor with following student comments about faculty member not actionable as opinion: "lying, deceiving, making false promises, not advising, lost time and credits, poor treatment of students, insulting, harassing, limited office hours, long lines of students waiting for extra help, poor teaching activities, lack of organization, losing assignments"); McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985) (statement that faculty member's refusal to teach a class constituted neglect of professional duties not actionable); Bellivcau v. Berick, 504 A.2d 1360 (R.I. 1986) (statement that only one of faculty member's listed publications was a "published" one not actionable); Foote v. Saralvan, 432 So. 2d 877 (La. Ct. App. 1983) (characterization of one faculty member's requirement to refund $127 as "payroll fraud" and another faculty member's publications on his biographical data sheet as "deceit" of the university and "false pretenses" not actionable).

[222] Petula v. Mellody, 588 A.2d 103 (Pa. Commw. Ct. 1991) (statements by two superintendents to over 100 potential employers of former principal contained statements that could be understood as communicating facts).

[223] 110 S. Ct. 2695 (1990).

Milkovich, the Court refused to create a separate constitutional privilege for opinion statements. Statements in a reporter's column that a high school wrestling coach had perjured himself were sufficiently factual to permit damages recovery for defamation.

Although defamation is a difficult cause of action to prove, there probably should be greater concern about such lawsuits during times of financial retrenchment when reduction in staff has been mandated. Some suggestions may make the prospect of such a lawsuit less likely:

(1) Do not send unsolicited letters of recommendation. Generally, no one can be required to write a letter of recommendation but sending one that is not requested may eliminate any qualified privilege and, if statements are untrue, may suggest malice.

(2) Make any negative comments as data based as possible. Conclusive statements such as "lazy," "not working up to capacity," "inefficient," "discipline problem" are subject to misinterpretations and are simply not as helpful as "he was on time to 5 of 20 faculty meetings" or "he has failed to turn in 10 of his 20 assignments on time."

(3) If student or staff evaluation comments appear to be substantially negative, submit the statement to the student or staff member for his comment prior to filing or sending. This procedure is not always possible but, since consent is an absolute defense, it may be a safeguard worth taking where possible. Always make it a practice to send a copy of the recommendation to the student or staff member prior to mailing, with a three to four day delay to provide time for possible response.

(4) Limit comments in student files or in letters of recommendation to firsthand accounts. To go beyond into the realm of rumor and hearsay is not only speculative, it may demonstrate reckless disregard for the truth.

(5) Permit student and staff to have access to their files even though such access may not be required by federal or state statutes.[22] There is no need to have information in a file that is hopelessly out of date and no excuse to have information that is possibly untrue.

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[22] The Federal Privacy Act applies only to schools receiving funds administered by the Department of Education. 20 U.S.C. § 1232(g); 45 C.F.R. § 99.1. State privacy statutes generally apply only to public schools, *e.g.*, ILL. ANN. STAT. ch. 105 § 10/2 (Smith-Hurd 1993); VA. CODE ANN. § 22.1-287 (1993).

(6) School officials need to be aware that even though truth may be a defense to defamation, it is not a defense to an action for invasion of privacy.[225]

Invasion of Privacy

In states that recognize invasion of privacy as a cause of action,[226] this tort has become increasingly popular in situations where defamation would not be a viable cause of action. Although frequently referred to as a separate tort, invasion of privacy is actually a complex of four analytically distinct causes of action: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life, and (4) publicity placing a person in false light.[227]

Generally, the standard in each of these actions is whether a disclosure "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[228] Thus, two newspaper articles making reference to parent-plaintiffs' son as having a learning disability were not publicity of the son's private life because the son's disability had been discussed at a school board meeting in the context of reimbursing his parents for the cost of an independent evaluation by a certified school psychologist.[229] In this case, the confidentiality normally accorded personally identifiable information under IDEA[230] was offset by the public's interest in knowing "that the school district was being asked to pay with tax dollars the cost of a privately retained psychologist . . . ."[231]

In *Salek v. Passaic Collegiate School*,[232] a picture in a school yearbook did not give rise to a false light invasion tort. In this case, a picture with plaintiff seated next to a male teacher who had his right hand raised to his forehead was captioned, "Not tonight, Ms. Salek." In essence, the trial judge determined as a matter of law that the meaning assigned by plaintiff to this picture, namely that male teacher was declining plaintiff's proposition to

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[225] For a discussion of invasion of privacy in an educational setting, see Diaz v. Oakland Tribune, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983) ($250,000 judgment).

[226] *E.g.*, see Russell v. Salve Regina College, 890 F.2d 484, 488 (1st Cir. 1989) (tort of invasion of privacy in Rhode Island is purely statutory and overweight student could not recover for unreasonable publicity concerning her obesity where the obesity was public); Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735, *aff'd* 542 N.Y.S.2d 90 (N.Y. App. Div. 1988) (New York does not recognize common law invasion of privacy resulting from unauthorized publication of one's picture).

[227] RESTATEMENT (SECOND) OF TORTS §§ 652 B-E.

[228] Culver v. Port Allegany Reporter Argus, 598 A.2d 54, 55 (Pa. Super. Ct. 1991).

[229] *Id.* at 55-56. IDEA provides that parents are entitled to an independent evaluation of a child "by a qualified examiner" at public expense. 34 C.F.R. § 300.503.

[230] 34 C.F.R. § 300.129.

[231] *Culver*, 598 A.2d at 56.

[232] 605 A.2d 276 (N.J. Super. Ct. App. Div. 1992).

engage in a sexual relationship, was not "highly offensive to a reasonable person."[233] As an interesting sidelight, the court held that under *Hazelwood School District v. Kuhlmeier*[234] that the school administration had no obligation "to exercise greater censorship over the content and/or style of the yearbook . . . .: [t]he desire on the part of school officials, however laudatory, to avoid any discomfort or unpleasantness to plaintiff would not have justified suppression of student speech by preventing publication of the photograph . . . ."[235]

In *Jarrett v. Butts*,[236] a faculty member who took pictures of a student in a classroom and in the hallway of a school building during regular school hours when other students were present did not intrude upon the plaintiff-student's seclusion or appropriate her name or likeness. The teacher had not revealed any aspect of the student "not readily visible to anyone who saw her during the day" and the teacher "received nothing of value for the photographs" nor were the photographs "sold, published or publicly displayed."[237]

An invasion of privacy claim against someone who has public figure status faces the same difficulty of recovery as that of defamation. In *Walko*,[238] plaintiff who was an Assistant to the Dean of the School of Education had a "limited purpose public figure" status. This case involved a student parody in the college newspaper of a help center hotline in which plaintiff was one of four persons listed as a person to call under the heading "Whoreline." Following the Supreme Court's decision in *Hustler Magazine v. Falwell*,[239] the New Jersey court determined that even assuming "that the 'Whoreline' ad would be highly offensive to a reasonable person,"[240] "a publication which no reasonable person could interpret as an allegation of fact is the equivalent of an expression of opinion that is fully protected under the First Amendment."[241] Thus, as in Hustler Magazine where the tort of intentional infliction of emotional harm cannot pierce the constitutional shield protecting parodies, neither can causes of action framed in defamation or invasion of privacy pierce that shield.

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[233] *Id.* at 279.
[234] 484 U.S. 260 (1988).
[235] *Salek*, 605 A.2d at 279.
[236] 379 S.E.2d 583 (Ga. Ct. App. 1989).
[237] *Id.* at 585.
[238] *Supra* note 219 and accompanying text.
[239] 485 U.S. 46 (1988).
[240] *Walko*, 561 A.2d at 687.
[241] *Id.* at 688.

Corporal Punishment, Child Abuse, and School Liability for Sexual Misconduct of Employees

Corporal punishment and child abuse are related but not identical problems. Corporal punishment in its broadest sense includes any physical contact between school personnel and students.[242] But more generally it is understood as a disciplinary measure for allegedly unacceptable behavior.

Corporal punishment as a means of student punishment does not have constitutional protection. In *Ingraham v. Wright*,[243] despite an egregious set of facts, the United States Supreme Court refused to find an Eighth Amendment[244] violation for excessive physical punishment, leaving students to pursue available state civil and criminal remedies. In addition, the Supreme Court has given at least tacit assent to denial of procedural rights before a student is spanked.[245] States vary in their approach regarding how schools should deal with corporal punishment, from a blanket endorsement[246] to prohibition.[247]

Civil or criminal liability for the use of corporal punishment depends upon a variety of factors such as the motive of the person inflicting the punishment the size of the student and the instrument used.[248] As the factors

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[242] *See, e.g.*, Andreozzi v. Rubano, 141 A.2d 649 (Conn. 1958) (teacher slapping student); Thomas v. Bedford, 389 So. 2d 405 (La. Ct. App. 1980) (teacher shaking student); Rodriquez v. Johnson, 504 N.Y.S.2d 379 (N.Y. Civ. Ct. 1986) (bus matron slapping student).

[243] 430 U.S. 651 (1977). *See also* Hale v. Pringle, 562 F. Supp. 398 (M.D. Ala. 1983).

[244] The eighth amendment prohibits "cruel and unusual punishments."

[245] Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion* 423 U.S. 970 (1975). *Compare* Goss v. Lopez, 419 U.S. 565 (1975) (before suspension for up to 10 days, public school students entitled at least to an informal hearing and opportunity to present their side of the conflict).

[246] MINN. STAT. ANN. § 609.06 (West 1987) (reasonable force to restrain or correct by a parent guardian, teacher or other lawful custodian of a child or pupil); W. VA. CODE, § 18A-5-1 (1993); ILL. ANN. STAT. Ch. 105, § 24-24 (Smith-Hurd 1993); OKLA. STAT. ANN. tit. 70, § 6-114 (West 1989); PA. STAT. ANN. tit. 24, § 1317 (West 1992) (teacher stands in place of parent or guardian in exercising authority over the pupil). *See also* Streeter v. Hundley, 580 S.W.2d 283 (Mo. 1979) (result of *Baker v. Owen* accepted as state law).

[247] MASS. GEN. LAWS ANN. ch. 71, § 37G (1982); ME. REV. STAT. ANN. tit. 17-A, § 106 (2) (West 1983); N.J. STAT. ANN. § 18A:6-1 (West 1989) (applies to public and private schools); VT. STAT. ANN. tit. 16, § 1161 A (1989) (applies to public and "approved schools"). In addition, Hawaii, the District of Columbia and the City of New York are examples of jurisdictions that have prohibited corporal punishment by administrative regulation. *See generally*, R. PAQUET, JUDICIAL RULINGS, STATE STATUTES AND STATE ADMINISTRATIVE REGULATIONS DEALING WITH THE USE OF CORPORAL PUNISHMENT IN PUBLIC SCHOOLS (1982).

[248] Tinkham v. Kole, 110 N.W.2d 258 (Iowa 1961) (teacher found to have acted in anger where teacher struck student on ear, bursting an eardrum, after directive given but before student had time to obey); Frank v. Orleans Parish Sch. Bd., 195 So. 2d 451 (La. 1967) (6'2", 230 pound physical education teacher squeezing student standing 4'9" and weighing 101 pounds, breaking student's arm found excessive); People v. Ball, 317 N.E.2d 54 (Ill. 1974) (paddle three inches wide and twenty inches long when used excessively found to be unreasonable);

suggest school personnel's administration of corporal punishment will be subjected to a reasonableness test, nonpublic schools usually attempt to prevent litigation by including consent to use corporal punishment in admission or re-enrollment forms. Unless corporal punishment is prohibited by state statute or is excessive, such forms are generally valid defenses to a civil or criminal charge that physical contact with the child was unlawful.[249] However, civil damages[250] or a criminal conviction[251] can occur for physical contact which may not seem excessive but which leaves marks such as bruises.

Religious schools which may object to statutory limitations on, or civil or criminal penalties for, the use of corporal punishment need to carefully consider the following: whether education of a child is a parental or institutional function; whether the biblical mandates about parental use of corporal punishment have direct application to institutions; whether institutions have a legitimate interest in requiring parents to delegate a parental responsibility regarding the use of corporal punishment regardless of whether or not parents use corporal punishment at home; whether institutions which require the delegation of corporal punishment are prepared to apply the delegation concept to all aspects of their operation; and whether an institution can perform its educative function without the use of corporal punishment.[252]

For nonpublic educational institutions which insist on using corporal punishment, the following parameters may serve as helpful guidelines:

(1) Provide notice to students and parents of the kinds of conduct which may result in corporal punishment;

(2) Use corporal punishment as a last resort, and instead emphasize alternative means of changing behavior;

(3) Investigate any denial of guilt prior to administering corporal punishment;

(4) Designate only one person in the school to administer the punishment;

Rodriguez, *supra* note 242 and Landis v. West Chester Area Sch. Dist., 353 A.2d 895 (Pa. 1976) (slapping student on face with bare hand not upheld).

[249] See R. Mawdsley, Child Abuse Reporting: Crisis in Christian Education, Vol. II (No. 1) 56 (1981).

[250] *Thomas*, *supra* note 242 (shaking student left bruises). *But see* Rodriguez, *supra* note 242 ($250 damages awarded for physical contact even though the court found the slapping not to be excessive and no physical marks were left).

[251] People v. Ball, 317 N.E.2d 54 (Ill. 1974).

[252] The comments of Dr. Kerby Alov, a consultant on mental health, are worth considering: "Children who are being abused at home are more likely to have learning problems at school . . . and, therefore, they are more likely to be candidates for corporal punishment. These children do not need the school to also teach them that violence is the way to solve problems and to prepare them for adulthood. They need to see that other adults are more creative and more caring."

(5) Have a witness present;

(6) Limit punishment to no more than three swats.

Child abuse differs from corporal punishment in two significant aspects. First, neither delegation of authority to spank nor consent to spank are valid defenses in a criminal prosecution for child abuse, based upon the concept that no parent can consent to child abuse.[253] Second, the emphasis in corporal punishment is upon purposes, methods, and motives, whereas in child abuse the emphasis is solely upon the results produced.[254] Every state has a statute defining child abuse and mandating reporting of such abuse by certain categories of people with sanctions that can be imposed upon those who fail to or refuse to report. The marked tendency among the states is to use an expansive definition of child abuse, such "as any nonaccidenatal physical injury, mental injury or sexual mistreatment inflicted on a child other than by accidental means."[255] Another similarity among the states has been a trend toward expansion of the categories of those required to report suspected child abuse,[256] although the specific designation of who is to report is as varied as the legislatures who have enacted the reporting requirements.[257] Every state appears to mandate child abuse reporting by school teachers and administrators although the expansiveness of the statutory language varies somewhat.[258] Clearly some of the mandated school categories could include not only the principal, teacher, coach, nurse, and counselor, but also the secretary and custodial staff, and, in some cases, even clergy.

In addition to designating who must report and what types of suspected abuse must be reported, child abuse reporting statutes also designate to whom the suspected abuse is to be reported and what rights the alleged child abusers have. Reports are normally made to the local child welfare unit,[259] but reports to local law enforcement officials are generally accept-

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[253] Mawdsley, *supra* note 249 at 57. *Pursuing Justice for the Child* 225-246 (M. Rosenheim, ed., 1976).

[254] Mawdsley, *supra* note 249 at 58.

[255] ARK. CODE ANN. § 12-12-502 (Michie 1987).

[256] Criminal sanctions are generally imposed for failure to report by those mandated to do so: ALA. CODE § 26-14-13 (1992); ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993); MINN. STAT. ANN. § 626.556 (West 1983) ("a professional . . . who is engaged in the practice of . . . education"); NEV. REV. STAT. ANN. § 200.507 (Michie 1991); VA. CODE ANN. § 63.1-248.3 (B) (Michie 1991); N.Y. SOC. SERV. LAW § 420 (McKinney 1992); ARK. CODE ANN. § 12-12-503 (Michie 1987).

[257] A thorough discussion of child abuse reporting statues can be found in R. Mawdsley and S. Permuth, *Child Abuse Reporting — A Search for an Acceptable Balancing of Interests*, 9 NOLPE SCHOOL L. J. 115 (1981).

[258] ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993) (school personnel, director or staff assistant of a nursery school or a child care center); ALA. CODE § 26-14-3(a) (1992) (school teachers and officials, day care workers or employees); NEB. REV. STAT. § 28-711 (1989) (school employee); TEX. FAMILY CODE ANN. § 34.01 (West 1986) ("any person having knowledge of . . . abuse or neglect").

[259] See, e.g., LA. REV. STAT. ANN. § 14:403 (D)(1) (West 1991).

able since the law enforcement officials must in turn contact the welfare agency.[260]

There are three levels of rights for the alleged child abuser:

(1)Rights prior to reporting;

(2)Rights after reporting to civil and criminal action;

(3)Rights after civil suit or criminal prosecution is commenced.

Since serious sanctions can be imposed upon an alleged abuser even after the filing of a report such as immediate temporary removal of a child from his parents, the most basic right of a parent or other person acting in loco parentis is not to have his name reported. For those in the educational field, the professional humiliation and fear of prosecution created by unnecessary reports are reason enough to exercise caution, even though statutes do not provide procedural safeguards at this point. In almost all states, the parent and school officials are left at the mercy of broad definitions of abuse that seem to mandate and encourage the reporting of any physical or mental injury that does not occur by accidental means. The occasional temporary bruise or scratch from corporal punishment or the alleged mental trauma caused by repeated verbal reprimands to a problem student are all possible areas of reporting. Some states, like Wisconsin, have appeared to remedy this problem by requiring the reporting of "severe bruising . . . or any injury constituting great bodily harm,"[261] but in fact all bruises and injuries tend to be reported regardless of severity. The problem for the person whose name is unnecessarily reported, is exacerbated by the statutory immunity from criminal or civil prosecution granted to those who report alleged child abuse. Most statutes protect the reporter who acts in "good faith,"[262] but some states have gone so far as to grant total immunity.[263] Because of the difficulty in proving "bad faith" or "malice," a reporter has virtual immunity from any legal sanctions. Disclosure of information related to child abuse charges to a limited number of persons who have legitimate interest is probably entitled to a qualified privilege protecting the person making the disclosure from defamation or invasion of privacy charges.[264]

The rights of an alleged child abuser after reporting and prior to civil or criminal sanctions are more clearly delineated in the statutes. At least one

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[260] LA. REV. STAT. ANN. § 403(D)(3) (West 1986).

[261] WIS. STAT. ANN. § 940.201 (West 1982).

[262] ILL. ANN. STAT. ch. 325, para. 5/9 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 14:403(E) (West 1986); N.Y. SOC. LAW § 419 (McKinney's 1992); OHIO REV. CODE ANN. § 2151.42.1 (Baldwin 1994); MONT. CODE ANN. § 41-3-203 (1985) ("unless the person acted in bad faith or with malicious purpose"); CAL. PENAL CODE § 11172 (West 1992) ("unless it can be proven that a false report was made and the person knew or should have known that the report was false or was made with reckless disregard of the truth").

[263] ALA. CODE § 26-14-9 (1992).

[264] Gawright v. Unified Sch. Dist. No. 457, 756 F. Supp. 1458 (D. Kan. 1991).

state authorizes investigators to talk to any child suspected of being abused "without consent of and outside the presence of his parent, guardian, legal custodian, or other person standing in loco parentis or school personnel."[265] Generally, an alleged child abuser is entitled to a copy of the investigative report of the local social service agency with an opportunity to amend or expunge the report.[266] At a hearing to amend or expunge the report, Illinois specifically requires that the person making the report must testify. At the same time, Illinois follows the pattern of most other states in prohibiting the maker of a report from invoking a privileged relationship, such as a physician-patient or pastor-penitent.[267] Needless to say, alleged abusers are entitled to employ an attorney to represent them.

The rights of a person charged with child abuse or molestation after the commencement of a civil or criminal action are the same as for any other civil or criminal defendant with one notable exception: courts will permit the tolling of statutes of limitations involving sexual offenses so that school personnel may be sued or charged with a crime years after the offense occurred.[268] The most basic right is the engaging of competent counsel. If the action is a civil suit for damages against school personnel concerning alleged abuse arising out of the employment relationship, the insurer for the school will probably provide an attorney as part of the liability insurance coverage.[269] If the action is criminal prosecution—and most likely it will be—the accused abuser will have to secure and pay his own attorney, unless the school employee is indigent.

Acts of sexual abuse or molestation by school employees may very well result in a civil action for damages against the employee and the employer, as well as criminal charges that flow from the sexual abuse. Civil actions

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[265] VA. CODE ANN. § 63.1-248.10 (Michie 1991).

[266] ILL. ANN. STAT. ch. 325, para. 5/7.4 (Smith-Hurd 1993).

[267] ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993) (Christian Science practitioner); VA. CODE ANN. § 63.1-248.3 (Michie 1991) (Christian Science practitioner); NEV. REV. STAT. ANN. § 432B.220.2(d) (1991) (clergyman); MONT. CODE ANN. § 41-3-201(2)(c) (1985) (religious healers).

[268] *See* Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986) (statute of limitations to file claim based on sexual abuse tolled during minority); Stoneking v. Bradford Area Sch. Dist., 667 F. Supp. 1088 (W.D. Pa. 1987) (whether statute of limitations should be tolled until three years after sexually molested student graduated from high school and became aware that cause of her emotional problems was the sexual abuse to which she had been subjected by a teacher was a question of fact to be decided by trier of fact). *But see* Doe v. First United Methodist Church, 629 N.E.2d 402 (Ohio 1994) (claims for assault and battery resulting from sexual abuse dismissed against church because minor failed to assert claims against perpetrator within one year of reaching majority where he knew identity of the perpetrator and was fully aware that a battery had occurred).

[269] *See* Eversole v. Wasson, 398 N.E.2d 1246 (Ill. App. Ct. 1980) (duty of the school to protect students may be broader than the employment and in such a case the school district insurer is still obligated to defend the teacher); Durham City Bd. of Educ. v. National Union Fire Ins. Co., 426 S.E.2d 451 (N.C. Ct. App. 1993) (insurance company had obligation to defend school district for rape of 12-year-old student by employee where claim was based on negligent hiring and retention rather than respondeat superior).

against employees will be grounded in torts such as assault and battery, but actions against employers will be based on theories such as respondeat superior and negligent hiring, supervision and/or retention. Nonpublic schools may find that liability insurance purchased to protect against just such lawsuits may be limited. Liability policies may have limitations that restrict the companies' obligation to defend the action and/or indemnify the teacher or school in the event of a successful damages recovery. In *Horace Mann Insurance Company v. Analisa N.*,[270] the insurance company was granted a summary judgment that it was not required to indemnify a teacher who, over the period of three months, had subjected one of his third grade students to twenty separate incidents, including exhibitionism, fondling, and masturbation. The liability policy provided for payment of damages "arising out of an occurrence in the course of the insured's educational employment activities."[271] *The Horace Mann* court concluded that a "reasonable insured could [not] expect that exclusively personal pursuits would be protected by the policy."[272] But an insurance company's obligation to defend an action based on sexual abuse may depend on whether the complaint is grounded in respondeat superior or negligent hiring and retention.[273] To the extent that faculty handbooks or state statutes require employers to "hold harmless" employees against whom damage awards have been granted, employers may in some cases be able to avoid the obligation where the employee's sexual abuse was considered to have been intentional or criminal in nature.[274]

School liability on the basis of respondeat superior requires that two elements be proved: (1) an official, job-related, hierarchical relationship exists in which the employee is given authority over a group of persons; and (2) the nexus between the exercise of the authority and the commission of the tort is such that it is reasonable to foresee that the authority might be abused to the detriment of the victim.[275] Respondeat superior is a difficult theory on which to base a recovery. In *Rita M. v. Roman Catholic Archbishop*,[276] seven priests had sexual relations with a sixteen-year-old girl. She became preg-

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[270] 263 Cal. Rptr. 61 (1989).

[271] *Id.* at 62.

[272] *Id.* at 64.

[273] *See* Durham City Bd. of Educ. v. National Union Fire Ins. Co., 426 S.E.2d 451 (N.C. Ct. App. 1993) (insurance company had obligation to defend school district against claims resulting from rape of eighth-grade student by basketball coach where plaintiff's claims were based on negligent supervision rather than respondeat superior).

[274] *See* Doe v. Durtschi, 716 P.2d 1238 (1986) (school district had no obligation to indemnify a fourth grade teacher under Idaho's Tort Claims Act where sexual assaults on students were considered to have been committed with criminal intent); Boykin v. District of Columbia, 484 A.2d 560 (D.C. App. 1984) (no obligation of school district to indemnify teacher for assault upon 12-year-old blind, deaf, mute student where teacher's actions were considered to have been for his own malicious and selfish purposes).

[275] *See* John R. v. Oakland Unified Sch. Dist., 256 Cal. Rptr. 766, 772 (Cal. 1989).

[276] 32 Cal. Rptr. 685 (Cal. Ct. App. 1986).

nant and was sent to the Philippines to give birth. In dismissing the complaint against the Archbishop as employer on the basis of respondeat superior, the court found the priests' misconduct to be both outside the scope of employment and not foreseeable. Sexual relations with parishioners "are [n]either required [n]or instant to a priest's duties."[277] Mere foreseeability was not enough for liability. "The foreseeable event must be characteristic of the activities of the enterprise . . . . It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church."[278]

A cause of action grounded in negligent hiring, supervision, and/or retention probably has a greater likelihood of success, at least from the standpoint that the intentional nature of the employee's acts are irrelevant to recovery. This cause of action depends on the thoroughness with which an employer investigates an applicant, and then, after hire, the adequacy of supervision and the employer's decision to retain an employee against whom sexual abuse charges have been sustained. Where a student has been sexually abused by an employee, this cause of action will compel examination of the thoroughness with which school officials reviewed an applicant's references and his or her ability to perform the responsibilities of the job. In part, the school's responsibility may depend on making clear that sexual misconduct/harassment between employees and students (and between two employees, as well) is prohibited. In *Scott v. Blanchett High School*,[279] a private high school was not liable in negligent hiring and retention for a sexual relationship that developed between a new teacher and a student where the school had found the teacher's references to be excellent and the school principal had expressed the school's opposition to premarital sex between faculty and students. Not only is it important to check references prior to hiring, but school personnel have an ongoing responsibility to investigate rumors after an employee has been hired and to make reference checks when a teacher is moved from a teaching position to an administrative position.[280]

In concluding this section, there are general admonitions of which nonpublic school personnel should be advised concerning child abuse reporting and school liability for the sexual abuse or molestation of students by employees.

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[277] *Id.* at 690.

[278] *Id.*

[279] 747 P.2d 1124 (Wash. Ct. App. 1987).

[280] *See* Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990) (investigation conducted prior to hiring teacher and again prior to promoting teacher to position as principal).

Child Abuse Reporting

(1) Child abuse and child abuse reporting statutes apply equally to the public and private sectors. There is no exemption for nonpublic schools.

(2) Almost all child abuse reporting statutes do not permit school personnel to exercise their judgment in deciding whether marks or injuries resulting from other than accidental means constitute child abuse. Apparently only social services personnel are permitted to make such a determination.

(3) A legislative policy mandating reporting cannot be subverted by a school's internal administrative policies. It is not unusual for schools to have a written or unwritten policy that school personnel are to report cases of alleged child abuse to a designated administrative official. Subordinate school personnel, if mandated to report by state statute, need to be aware that reporting suspected child abuse to a school administrator does not excuse them from their statutory responsibility if the administrator fails or refuses to notify social services.[281]

(4) Any school personnel whose names are reported should act promptly to protect themselves and to contact an attorney prior to granting an interview to a social services representative. Waiting until trial to engage legal counsel may jeopardize one's case if damaging admissions have already been made.

School Liability for Sexual Abuse of Students

(1) Check all applications for periods of employment that are accounted for.

(2) Require a reference from the most recent place of employment.

(3) If the applicant has prior teaching/administrative experience, require a reference from each prior school.

(4) Adopt a policy prohibiting sexual conduct (including both contact and conversation) between students and employees.

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[281] *E.g.*, see ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993) ("Under no circumstances shall any person in charge of such institution, school, facility or agency, or his designated agent to whom such notification has been made, exercise any control, restraint, modification or other change in the report or the forwarding of such report to the Department [of Children and Family Services]").

(5) State your policy on sexual conduct to each reference and ask whether the applicant has been involved in conduct or has been accused of conduct that would violate your policy.

(6) Where permitted by your state, conduct a criminal background check.[282]

(7) Ask the applicant on the application whether he/she has been convicted of any felony or misdemeanor involving sexual conduct with minors.

(8) Come to closure on every allegation or rumor involving past or present sexual misconduct of an employee, documenting the persons contacted, the substance of each contact, and the result of the investigation.

(9) If closer supervision is the result of the investigation, identify the person to perform the supervision, the times/places to be supervised, and frequency of reviewal of supervision.

(10) Place statements pertaining to allegations or rumors, and documentation pertaining to investigation in the employee's personnel file, not in a separate administrative file.

(11) Reflect complaints regarding sexual misconduct in employee evaluations where the result of the investigation has involved any form of discipline or increased supervision.

(12) Publicize the school policy on sexual conduct and encourage students, parents, and employees to report violations.

Equipment and Facilities

The potential for liability involving defective equipment or facilities theoretically exists in all areas of education but is a special concern in certain high-risk areas. As will be noted in this section and in the following section

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[282] The State of Ohio provides that both public and chartered nonpublic schools can request information pertaining to applicants for convictions of felonies and misdemeanors in the first degree. OHIO REV. CODE § 109.51 et seq. (Baldwin 1992) The Bureau of Criminal Identification and Investigation performs this service after receiving the following information:

(1) The complete name, current address, and other identifying characteristics of the individual whose records are sought; "Other identifying characteristics" means birth, social security number, height, weight, sex, race, and nationality. OHIO ADMIN. CODE § 109:5-1-01 (1992);

(2) A complete set of fingerprints of the individual whose records are sought;

(3) The signed consent of the individual whose records are sought.

on supervision, legal problems involving defective equipment or facilities frequently overlap with problems of supervision.

Clearly, the highest risk area involving defective equipment or facilities is the industrial arts shop, followed by the science lab, the playground, and areas designated for use in athletics. School personnel have been found to be negligent in permitting students to use a known defective burner in the science lab.[283] Likewise, a defective blade guard on a circular table saw in an industrial arts wood shop generated liability for the school and the manufacturer of the saw because a school has a high responsibility for programs which "frequently expose young persons to dangers which they otherwise would not encounter in the school setting."[284] School personnel have a responsibility to issue equipment which is appropriate. Thus a teacher issuing an adult-size bat to an elementary female student who has never been taught how to swing a bat is responsible, for example, to the catcher hit in the face with the bat.[285] Football appears to be the most dangerous athletic sport, and the helmet the most frequently litigated piece of equipment.[286]

The absence of safety features has frequently been the subject of litigation. In *Scott v. Independent School Dist. No. 709*,[287] a Minnesota statute required that, "Every person shall wear industrial quality eye protective devices when participating in, observing or performing any function in connection with, any courses or activities taking place in eye protection areas . . . of any school, college, university or other educational institution in the state."[288] The defendant school district was found liable for an eye injury to a student who had temporarily removed his safety goggles. The *Scott* court noted that the statute did not impose strict liability and hypothesized a set of facts where, despite repeated warnings, a student nonetheless took off his goggles, but it is doubtful that a court would ever find that set of facts. Similarly, courts generally find on behalf of injured students where blade guards are not present on shop equipment.[289] Shop teachers are expected to be able to anticipate safety hazards and to act to minimize potential injuries.

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[283] Station v. Travelers Ins. Co., 292 So. 2d 289 (La. Ct. App. 1974).

[284] South Ripely Community Sch. Corp. v. Peters, 396 N.E.2d 144 (Ind. Ct. App. 1979).

[285] Ausmus v. Board of Educ. of Chicago, 508 N.E.2d 298 (Ill. App. Ct. 1987).

[286] Gerrity v. Beatty, 373 N.E.2d 1323 (Ill. 1978) (improperly fitted football helmet); Everett v. Bucky Warren, 380 N.E.2d 653 (Mass. 1978) (manufacturer liable for improper hockey helmet construction and private school hockey coach liable for requiring student to wear helmet).

[287] 256 N.W.2d 485 (Minn. 1977).

[288] MINN. STAT. ANN. § 126.20.1 (West 1994). The statute applies equally to both public and private schools.

[289] Barbin on Behalf of Barbin v. State,506 So. 2d 888 (La. Ct. App. 1987) ($185,000 judgment, 80% of which against the teacher for regularly using saw without a guard); Knight v. City of Phila., 445 A.2d 778 (Pa. Super. Ct. 1982); Scott County Sch. Dist. No. 1 v. Asher, 312 N.E.2d 131 (Ill. App. Ct. 1974); Matteucci v. High Sch. Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972) (blade guards not on circular table saws); Severson v. City of Beloit, 167 N.W.2d 258 (Wis. 1969) (absence of guard over a grinder that exploded).

In *Edkins v. Board of Education of City of New York*,[290] a student injury resulting from being drawn into a piece of equipment by a loose shirt was determined to have been preventable had the school simply issued shop aprons to students to prevent the contact of loose clothing with equipment. Similarly, failure to furnish a safety helmet or face mask to a catcher in an elementary baseball game[291] or to provide sufficient matting protection around a vaulting horse to ensure a safe landing[292] can be the basis for liability. Teachers are expected to be familiar with the proper safety equipment to be used and substitution of a less safe piece of equipment may result in liability.[293] Generally, faculty members are responsible for knowing what the limits of safety are for any equipment to be used by students.[294]

It is expected that school personnel will choose facilities appropriate to the danger represented in high-risk areas. In the case of *Bush v. Oscada Area Schools*,[295] a student was seriously burned when a ninth grade physical science lab was moved from the science laboratory to a vacant math room because repairs were being made to the laboratory. In addition to the classroom teacher's liability for failure to adequately instruct and supervise, the building principal was negligent in making the room assignment with the presumed knowledge that chemicals, fumes, and flames would be present. School personnel and the school itself will generally be liable if a student is injured by a defect on the premises that could have been discovered with a reasonable amount of diligence.[296]

Knowledge of dangerous conditions at a site used by school students can result in liability for a school, even though the site is not on school property. In *Drake v. Mitchell Community Schools*,[297] a high school student contracted a severe case of histoplasmosis from pigeon droppings in an old grain elevator owned by a local bank that was being used by the school for an annual Halloween fund-raising event as a haunted house. Even though the school district was immune under the state's Tort Claims Act for inadequate or negligent inspection of the grain elevator, the school's student council advisor was aware, independent of any inspection, of the risk to students' health. Failure to communicate the risk to the students and to take precautionary measures constituted a breach of the school's duty. With appropriate warning, "students could have been forbidden to enter the building before it

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[290] 41 N.E.2d 75 (N.Y. 1942).

[291] *Ausmus*, *supra* note 285.

[292] Singer v. School Dist. of Phila., 513 A.2d 1108 (Pa. Commw. Ct. 1986).

[293] Kirchner v. Yale Univ., 192 A.2d 641 (Conn. 1963) (use of push stick instead of push block).

[294] Miller v. Macalaster College, 115 N.W.2d 666 (Minn. 1962) (rented scaffolding).

[295] 250 N.W.2d 759 (Wis. 1977).

[296] Adom v. Evangeline Parish Sch., 376 So. 2d 372 (La. 1979) (large piece of concrete on base path); Sims v. Etowah County Bd. of Educ., 337 So. 2d 1310 (Ala. 1976) (improperly installed spectator bleachers); Short v. Griffits, 255 S.E.2d 479 (Va. 1979) (glass on track). *Contra* Nunez v. Isidore Newman High, 306 So. 2d 457 (La. 1975) (wet gym floor).

[297] 628 N.E.2d 1231 (Ind. Ct. App. 1994).

had been cleaned or could have been required to wear dust masks until the elevator was cleaned."[298]

The problem of defective, inadequate, or inappropriate equipment and premises ought to be a concern for all school officials since it is difficult to defend a lawsuit based upon such a complaint. As with students who generally must use whatever equipment or facilities they are instructed to use and a faculty member who is responsible for selection of equipment and facilities, it is virtually impossible for schools to win.[299] Even where a student increases the risk of injury through his own forgetfulness or disobedience courts are reluctant in noncomparative negligence states to allow a student's error to be the basis for dismissal of the complaint.[300] Courts will sometimes go to what would appear to be extreme limits to find school liability, as where a school was negligent in not replacing a floor to ceiling glass window prior to a student running through it while engaging in unauthorized races in a hallway. The school had earlier replaced glass at the other end of the hallway after a visiting coach had walked through it.[301]

A more troublesome area is whether premises are reasonably safe so as to protect students from outside intruders. In *Vangeli v. Schneider*,[302] a dormitory student at Cornell University had been assaulted in his dormitory room after an intruder had scaled a three story steel grating, entered the dorm from an exterior stairwell through an unlocked fire door, and broke down the student's dead-bolted door. Despite the unlocked fire door, the court found that the university had provided "reasonable security measures" in light of the "extraordinary and unforeseeable means" by which the intruder had gained entrance.[303]

Because of the substantial likelihood of successful lawsuits where defective equipment or facilities are involved, the following steps should be taken to reduce the prospect of liability:

(1) Regularly inspect all equipment;

(2) Hire only personnel properly qualified so as to be reasonably assured that those personnel will be familiar with defects and safety measures;

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[298] *Id.* at 1234.

[299] However, see Paulsen v. Unified Sch. Dist. No. 368, 717 P.2d 1051 (Kan. 1986) (school and teacher not liable to student injured on table saw, even though teacher knew students were not using guard and teacher had replaced blade just before injury leaving guard lying on floor, because student had taken beginning woodworking and had passed test on table saw).

[300] See Matteucci v. High Sch. Dist. No. 208, 281 N.E.2d 383 (Ill. App. Ct. 1972) where the court imposed a higher duty on the teacher to offset student error. For an example of a comparative negligence state, see Scott v. Independent Sch. Dist. No. 709, 256 N.W.2d 485 (Minn. 1977) where a $60,000 judgment in favor of the injured plaintiff was reduced to $54,000 because of ten percent student contributory negligence.

[301] Wilkinson v. Hartford Accident & Indem. Co., 411 So. 2d 22 (La. 1982).

[302] 598 N.Y.S.2d 837 (N.Y. App. Div. 1993).

[303] *Id.* at 839.

(3) Instruct students in equipment defects and have them report immediately any indications of defects;

(4) Remove students from high-risk classes when they demonstrate disregard for safety rules;

(5) Instruct faculty to report all defects in equipment and facilities;

(6) Discontinue use of any equipment and facilities until defects or hazards are corrected;

(7) Inspect facilities prior to each use for defects or hazards.

Supervision of Students

Supervision of students is a multifaceted problem involving the interplay of a number of legal questions: whether the teacher's immediate presence could have prevented the student's injury;[304] whether the teacher adequately instructed the students regarding safety hazards;[305] whether a teacher adequately instructed subordinate or substitute employees;[306] whether a teacher made and enforced adequate safety rules;[307] whether the number of supervisory personnel were adequate for the circumstances;[308] and whether dangers or risks requiring supervision were known by the school.[309]

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[304] Hanley v. Hornbeck, 512 N.Y.S.2d 262 (N.Y. App. Div. 1987) (no liability where teacher separated fighting boys within seconds of beginning of fight); Patterson v. Orleans Parish Sch. Bd., 461 So. 2d 386 (La. Ct. App. 1984) (no liability where student's leaving line occurred despite teacher's safe, orderly procedures).

[305] Webber v. Yeo, 383 N.W.2d 230 (Mich. Ct. App. 1985) (failure to adequately instruct beginner swimming class); Levine v. Live Oak Masonic Housing, Inc., 491 So. 2d 489 (La. Ct. App. 1986) (teacher instruction on electrical wiring adequate so no liability for school or teacher for deaths resulting from incorrect wiring).

[306] Verkel v. Independent Sch. Dist. No. 709, 359 N.W.2d 579 (Minn. 1984) (failure of school to instruct cheerleader adviser on responsibilities).

[307] Cathright v. Lincoln Ins. Co., 688 S.W.2d 931 (Ark. 1985) (absence of rule not cause of student hanging himself); Kingsley v. Independent Sch. Dist., Hill City, 251 N.W.2d 634 (Minn. 1977) (failure to enforce rule a cause of injury).

[308] Communtzis v. Pinellas County Sch. Bd., 508 So. 2d 750 (Fla. Dist. Ct. App. 1987) (liability for failure to assign teacher to cafeteria near which a student was beaten); Collins v. Bossier Parish Sch. Bd., 480 So. 2d 846 (La. Ct. App. 1985) (ratio of one teacher to 100 students not inadequate).

[309] Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987) (school liable for student rape because of knowledge of prior attempted assaults); Lawrence v. Grant Parish Sch. Bd., 409 So. 2d 1316 (La. Ct. App. 1982) (school liable where teacher knew table saw stored in classroom without guard or warning sign); Carr v. Indian Lake Sch. Dist., 490 N.Y.S.2d 950 (N.Y. App. Div. 1987) (no liability for thrown snowball where no prior notice); Velez v. Our Lady of Victory Church, 486 N.Y.S.2d 302 (N.Y. App. Div. 1985) (no liability for toppled desk where no prior notice of problems); Rhea v. Grandview Sch. Dist. No. JT, 694 P.2d 666 (Wash. Ct. App. 1985) (no liability despite knowledge by adviser and principal that high school students on release day may have alcohol at party).

Clearly the threshold concern in supervising students ought to be the competency of those directly responsible for supervision. Such competency may be related to formal training or to instructions by someone on the school premises. It has thus been held to be negligence for a school to permit a janitor to supervise noontime gym activities[310] and for a school to permit a student to treat an injured athlete.[311] The absence of teacher certification does not in itself appear to constitute negligence per se since presumably a certified teacher, instructing in certain subareas of a broad certification area, may have less knowledge of safety hazards than a noncertified teacher with extensive practical experience in the subareas. In high-risk areas practical experience may be more important to successful defense of a lawsuit than formal certification. In *Green v. Orleans Parish School Board*,[312] a teacher, presumably certified in physical education but with no formal training in wrestling, escaped liability largely because the student's injury did not result from improper instruction. The teacher in Green had learned some wrestling techniques from college wrestlers, books, and short clinics; but it would seem to be foolhardy for a teacher to test the adequacy of his knowledge by the vagaries of the manner in which a student is injured.

The use of persons to instruct in high-risk areas without knowledge of common hazards and safety procedures is potentially dangerous. In *Brahatcek v. Millard School District No. 17*[313] a student teacher, who was assigned by the cooperating school to take the place of the absent regular physical education teacher, was liable, along with the school, for the death of a student. The liability in *Brahatcek* appeared to hinge not on the status of the student teacher but upon the alteration of procedures in the curriculum manual by the other regular physical education teacher, plus the student teacher's lack of awareness of safety hazards involving the swinging of golf clubs in a gymnasium. In *Lynch v. Board of Education of Collinsville*,[314] coaching by untrained and inexperienced classroom teachers of a "powder-puff" girls' tackle football game created liability for the school district. If a teacher does not have practical experience in certain subareas of high-risk subjects, it would probably be better not to offer those subareas at all. In a tragic set of facts, a student was rendered a quadriplegic as a result of an injury in the gymnastics part of a physical education class. He recovered a judgment in excess of $1,000,000,[315] ninety percent of which was against the physical education teacher who had just taken over the class a few weeks earlier after the former teacher had been drafted. The new teacher not only

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[310] Garber v. Central High Sch. Dist., 251 N.Y.S.2d 214 (N.Y. App. Div. 1937).
[311] O'Brien v. Township High Sch. Dist., 392 N.E.2d 615 (Ill. App. Ct. 1979).
[312] 365 So. 2d 834 (La. 1979).
[313] 372 N.W.2d 680 (Neb. 1979).
[314] 380 N.E.2d 526 (Ill. App. Ct. 1979).
[315] Larson v. Independent Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1980).

unwisely continued the gymnastics part of the class, he also increased the difficulty of a basic gymnastics skill, a headspring over a rolled mat. By failing to sit on the rolled mat while the student performed a headspring over the rolled mat, the teacher appeared to lack even the most rudimentary knowledge of safety procedures. Thus, a simple exercise that could have been performed quite safely where supervised by a properly trained teacher was rendered extremely dangerous.

Although the usual high-risk areas will probably always continue to exist in schools, new areas of risk may appear. One such area seems to be cheerleading, which has become as much a gymnastics display as an act of leading cheers. In *Fisher v. Northwestern State University*,[316] a female cheerleader fell to the ground and broke her ankle while performing a stunt. She recovered $74,448.50 against the university on the theory that the university was sixty-five percent liable in failing to provide adequate supervision. In reversing the damages award, the appeals court identified the following reasons why the university had no duty to provide adult supervision to monitor cheerleading practice.

(1) No adult supervisor probably exists "who has the capability of telling cheerleaders what stunts they can safely try next."[317]

(2) There are not enough experts in the state to go around to all high schools and colleges.

(3) Cheerleaders are young adults (at least at the university level) who had been instructed in proper safety techniques at required training camps.

(4) Cheerleaders used spotters at practice.

(5) Policy choice by the university and cheerleaders that cheerleaders should gain responsibility through autonomy did not create liability.

Although much is made of the fact of certification in certain situations,[318] the courts in tort liability cases appear to largely ignore the facade of certification and examine the teacher's knowledge and implementation of safety procedures. In one interesting Title VII non- tort liability case, a federal district court actually rejected a school district's defense that it could not accommodate an industrial arts teacher's claim to be absent for religious rea-

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[316] 624 So. 2d 1308 (La. Ct. App. 1993).

[317] *Id.* at 1311.

[318] The failure of nonpublic schools to employ certified teachers have resulted in truancy convictions against parents, State v. Shaver, 294 N.W.2d 883 (N.D. 1980), State v. Moorhead, 308 N.W.2d 60 (Iowa 1981), and an injunction against operation of the school, State v. Faith Baptist Church of Louisville, 301 N.W.2d 571 (Neb. 1981).

sons because it had no certified industrial arts substitute.[319] The federal court appeared satisfied that even though the substitute was not a certified industrial arts teacher, he had helped construct buildings and had taken three years of industrial arts in high school. What tort liability implications such accommodation in Title VII cases might have where a student is injured while the noncertified teacher is in charge is uncertain, but liability would probably hinge upon the substitute's safety procedures and not upon his or her certification status.

The supervisory responsibilities of school personnel are affected by the nature of the area to be supervised. To increase the number of team players or to reduce the size of a playing area may create liability. In *Sutphen v. Benthian*,[320] a physical education teacher was negligent for increasing the number of players on a floor hockey team while simultaneously reducing the playing area for each game to one-half of the gymnasium. The teacher's intention to involve as many of the students in the class is admirable, but deviations from prescribed rules or standard practices are always calculated risks in high-risk areas. It is possible to enhance a school's potential for liability by increasing the size of the area to be supervised. In *Kersey v. Harbin*,[321] an injured student alleged sufficient facts to warrant a trial on the issue of negligence where one physical education teacher, during the absence of another physical education teacher, agreed to handle both classes at the same time. The student injury occurred between the locker room and the gymnasium while the teacher was in the locker room. In *Kersey*, both teachers had assured the principal that one teacher could handle both classes. The appellate court held that the trial court had improperly granted summary judgement as there were undecided issues of fact as to the adequacy of the supervision.

The distance that supervisory personnel are away from the site of injury is a factor in court decisions, but there is obviously no requirement that a teacher be in close proximity to every student. There is no way to predict what is a safe distance to prevent liability, because the distance must always be related to the nature of any danger. A teacher 1,000 feet from a student injured on a playground has been held to have been too far away to provide adequate supervision.[322] Such a great distance probably provides inadequate supervision regardless of the apparent safety of a play area. One teacher, while supervising alone a football field-sized play area, prevented

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[319] Wangsness v. Watertown Sch. Dist., 541 F. Supp. 332 (D.S.D. 1982).

[320] 397 A.2d 709 (N.J. 1979).

[321] 591 S.W.2d 745 (Mo. Ct. App. 1979). *See also* Brahatcek v. Millard Sch. Dist. No. 17, 372 N.W.2d 680 (Neb. 1979) (deviations from a school's prescribed curriculum guide as to where student were to stand to swing golf clubs was a basis for liability).

[322] Decker v. Dundee Cent. Sch. Dist., 151 N.E.2d 866 (N.Y. 1958).

liability for herself and her school district by positioning herself approximately thirty feet from the stump of a tree that had recently been cut down.[123] The stump had apparently been cut smooth on top. Just how the court would have decided the case had the student been injured on a stump with rough, jagged edges is difficult to say. Similarly, a teacher supervising 100 students on a playground was not liable because the court considered as adequate her instructions to students regarding the use of playground equipment.[124] Occasionally teachers have work or storage areas that do not permit visual contact with all students at all times. Liability in such cases is never predicated solely upon the distance of the teacher from the student or the lack of visual contact, but upon whether the teacher should have reasonably anticipated certain kinds of problems, such as conflicts among students,[125] danger represented by certain kinds of equipment,[126] and the possibility of student error due to inadequate instruction for new equipment.[127]

Adequacy of teacher instruction as related to the potential danger of a school area is a legal problem that demands particular attention. The recent case of *Smith v. Archbishop of St. Louis*[128] is a good example of the relationship among teacher supervision, teacher instruction, and a potentially dangerous classroom situation. In *Smith*, a teacher in a Roman Catholic elementary school had placed a lighted candle on her desk as a religious exercise. The second graders in plaintiff's room were preparing for a school play, and while plaintiff and her classmates were putting on their paper costumes in the classroom, plaintiff's costume caught fire on the candle resulting in burns to twenty-two percent to forty-five percent of her upper body. The plaintiff spent twenty-six days in a hospital with much physical and psychological pain because of burns and grafting. Plaintiff's psychologist testified regarding permanent psychological harm when plaintiff reaches adolescence because of very noticeable scars. In upholding a $1,250,000 judgment against defendant archdiocese, the appellate court appeared to rely upon the following facts in the case:

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[123] Partin v. Vernon Parish Sch. Bd., 343 So. 2d 417 (La. Ct. App. 1977).

[124] *Collins*, *supra* note 308.

[125] *Hanley*, *supra* note 304; Hammond v. Scott, 232 S.E.2d 336 (S.C. 1977); Collins v. Wilson, 331 So. 2d 603 (La. 1976); Kim v. State of Haw., 616 P.2d 1376 (Haw. 1980).

[126] *Lawrence*, *supra* note 309.

[127] Miles v. School Dist. No. 138, 281 N.W.2d 396 (Neb. 1979) (instruction to student who had operated same machine in prior class); Potter v. North Carolina Sch. of the Arts, 245 S.E.2d 188 (N.C. 1978) (instruction to student who had never operated a fog machine); Brittan v. State, 103 N.E.2d 485 (N.Y. 1951) (instruction to students administering physical education tests); Miller v. Macalaster College, 115 N.W.2d 666 (Minn. 1962) (instruction in assembling and use of scaffolding). *See also*, cases cited at *supra* note 305.

[128] 632 S.W.2d 516 (Mo. Ct. App. 1982).

(1) The classroom teacher knew that students and lighted candles posed a potential danger, but no special instruction had been given prior to the day of injury, and none had been given on the day of the injury.

(2) The principal of the school acknowledged that seven- and eight-year-old children do not pay much attention to their own safety.

(3) Defendant archdiocese had no guidelines or policy regarding burning candles in a classroom.

While noting that a school is not an insurer of a child's safety and that a teacher is not required to keep each member of her class within her eyesight at all times, the *Smith* court declared that ordinary care for children requires more vigilance and caution than for adults.

Supervision of students is obviously a critical school responsibility—one that can be costly, both financially and in the area of public relations, where such supervision is inadequate. The higher the risk area, the greater is the duty to supervise and the greater is the likelihood that a school may be found negligent even where it has appeared to exercise ordinary care. The chain reaction effect of liability is illustrated in *Sansonni v. Jefferson Parish School Board*[29] where an injured sixth-grade plaintiff recovered $45,000 as a result of a fall in a school lunchroom on some spilled spaghetti sauce. The Sansonni court noted that a school lunchroom is a high-risk area and that the defendant school's failure to adequately supervise made it responsible for all costs and damages. Normally a fall on a lunchroom floor might produce a bruise but in the case of the plaintiff, who had osteogenesis imperfecta, a congenital defect that causes brittle bones, it resulted in a broken leg. Plaintiff spent thirty-four days in traction and six weeks in a body cast as a result of which he developed kidney stones necessitating six more days in the hospital. The prolonged hospitalization and wearing of the body cast contributed to a fracture of the vertebrae resulting in the need to wear a back brace. Despite the correct medical care, one leg did not heal properly and became shorter and bowed. The bowed and shorter leg put strain on the other leg necessitating the wearing of a leg brace. What began as a simple fall in a high-risk area ended up as a painful experience for the student and an expensive lesson for the school.

No area of negligence gets more attention from nonpublic school administrators than the absence of supervision. Normally, absent supervision is approached solely as an absent teacher problem. Such an approach is unfortunate since there are really two separate and distinct problem areas—the absent student and the absent teacher. A student may be absent from adult

[29] 344 So. 2d 42 (La. Ct. App. 1977)

supervision for a number of reasons. Students in hallways during classes and in restrooms are very often unsupervised. In *Larry v. Commercial Union Insurance Co.*,[330] a day care student injured in a restroom successfully sued the school. Because of the large number of students in the classroom, the student was able to leave the classroom for the restroom without the knowledge of the teacher. As mentioned earlier, liability in such absent student situations is probably based less on the absence of direct supervision than upon the presence of dangerous conditions, such as wet restroom floors or assaults in the hallways or restrooms by older students or strangers that could have reasonably been anticipated by school personnel.

Students need to be instructed frequently on safety rules in hallways and restrooms including the necessity of promptly reporting dangerous or suspicious circumstances, such as wet floors or strangers in the building. In *District of Columbia v. Doe*,[331] a fourth-grade girl recovered over $250,000 in damages after she was lured from the school and raped. The teacher had left the girl in charge of a second-grade class while the teacher went to another area of the building for supplies. The more school personnel deviate from established rules or routines, the greater the likelihood of liability. To send students to restaurants, neighboring stores, or teachers' cars to secure items for teacher use or items for school use are situations that would be difficult to justify in court. The sending of ill or injured students to a nurse's office or another school office are frequent school procedures, yet seldom is much thought given to possible problems that could occur on the way to the office. Does the student know the way to the office? Is he or she so ill or injured that other students should be sent with him or her? Is there reason to expect problems in the hallways, such as other aggressive students? With elementary students it is never a bad practice to send one or two students along with a student sent to the office to assure that he or she does in fact arrive at the intended destination. Junior and senior high students would probably not want a fellow traveler unless they do not know the way or unless they appear to be too ill to be sent alone. A teacher or school would not normally be liable for assaults in hallways, restrooms, or other unsupervised areas unless there was actual knowledge or specific indications of bad feelings between students[332] or of systemic school unrest, such as racial unrest.[333] A student who leaves school without permission and is injured or killed normally does not generate liability for the school.[334]

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[330] 277 N.W.2d 821 (Wis. 1979).

[331] 524 A.2d 30 (D.C. 1987).

[332] Gammon v. Edwardsville Commun. Unit Sch. Dist. No. 7, 403 N.E.2d 43 (Ill. App. Ct. 1980).

[333] School Bd. of Palm Beach v. Anderson, 411 So. 2d 940 (Fla. Dist. Ct. App. 1982).

[334] Levandoski v. Jackson County Sch. Dist., 328 So. 2d 339 (Miss. 1979) (student killed after skipping school); Oglesby v. Seminole City Bd. of Instr., 328 So. 2d 515 (Fla. Dist. Ct. App. 1976) (student killed on way home from school). *Contra* Hovem v. Manhattan Beach City Sch. Dist., 585 P.2d 851 (Cal. 1978) (student injured after skipping out of school).

The teacher who absents herself or himself from the classroom or area where students are located presents a more frequently litigated problem, but such a problem is one over which nonpublic school administrators should have more direct control. Contrary to popular myth, there is no absolute liability for a teacher or school if a teacher leaves the classroom unsupervised. Any liability in such a situation will depend upon the resolution of two factual questions. First, could the teacher's presence could have prevented the student injury? Such a determination will depend upon the nature of the class (English composition versus industrial arts), upon knowledge of the students in the class (personal hostilities or medical or special education problems), and upon school requirements.[335] Second, what was the reason for teacher absence? This reason needs to be balanced against the items in the first question. Reasons for teacher absence can best be viewed on a spectrum from emergency situations at one end, as when a teacher assists an ill or injured student to the office, to solely personal concerns at the other end, as when a teacher goes to the faculty lounge during classtime for a cup of coffee.

The farther toward the emergency end of the spectrum for a teacher's absence, the more substantial the proof will have to be to show that the teacher's presence could have prevented an injury. The reverse of this is true when the teacher's absence moves closer to the personal end of the spectrum. In *Laurence v. Grant Parish School Board*,[336] an industrial arts teacher who frequently left the class to get scrap metal for welding and to catch students smoking was found negligent, along with the school, when a student severed a finger on a table saw stored in one of the welding booths. The fact that the teacher told the students at the beginning of the course not to use the power equipment coupled with the fact that he gave them a list of over 200 rules regarding the use of equipment in class did not excuse or mitigate his absence. Industrial arts classrooms are high-risk areas and the teacher's absence in *Laurence* suggested poor lesson-planning as well as the performance of unnecessary policing functions during classtime. In *Cirillo v. City of Milwaukee*,[337] forty-eight twelve-to fourteen-year-old students were instructed to shoot baskets and not to engage in horseplay while the teacher left the class for some unknown reason. The teacher was absent for twenty-five minutes and during that time, two students began engaging in a progressively rougher game of keepaway until plaintiff was injured. While

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[335] Rock v. Central Square Sch. Dist., 494 N.Y.S.2d 579 (N.Y. App. Div. 1985) (no liability for school or teacher when student struck in eye by thrown pencil; teacher was in classroom doorway observing hallway during passing of classes as required in Faculty Handbook).

[336] 409 So. 2d 1316 (La. Ct. App. 1982).

[337] 150 N.W.2d 460 (Wis. 1967).

the teacher's instructions to the students were commendable and paralleled the proper procedures to follow for any teacher absence, the supreme court reversed the trial court's dismissal of the complaint. However, absence of a teacher from a classroom where one student is injured by another because the teacher is in the hallway between classes monitoring the passage of students moves substantially away from the personal end of the supervision spectrum and makes recovery for lack of supervision by a plaintiff more difficult.[338] The emergency end of the spectrum is illustrated by *Kim v. State of Hawaii*[339] where a female teacher left her classroom to go next door to get the principal and assistant principal to restrain a student who had suddenly entered her classroom to attack one of the students. During her brief absence, the student attacked was seriously injured. The supreme court affirmed the trial court's dismissal of the complaint, primarily because this was an emergency situation with no reasonable notice to the teacher of the probability of invasion of the classroom by another student. Finally, in *Hammond v. Scott*,[340] an industrial arts teacher was in a storage room adjacent to the classroom supervising the storage of projects, when one student, standing two feet from a trash barrel, threw a nail toward the trash barrel and struck plaintiff in the eye. Dismissal of the complaint against the teacher and the school was sustained because the teacher consistently enforced his rule against throwing objects and because there was no evidence of ill feeling between the two students.

Adequate supervision is definitely the key to the avoidance of unwanted litigation. The following general suggestions may tend to increase the safety awareness of supervisory personnel.

(1) Hold at least one faculty and staff in-service day at the beginning of each school year to make school personnel aware of potential problems. Faculty and staff should have primarily a preventive function with regard to student safety rather than a reactive function.

(2) Faculty in high-risk equipment areas should test each student on each piece of equipment and have each student sign a set of course safety rules to acknowledge receiving and reading them.

(3) Periodic oral instructions in high-risk equipment areas are always advisable, e.g., guard must be on the saw before use.

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[338] *See* Coyle v. Harper, 622 So. 2d 303 (Ala. 1993) (teacher monitoring passage of students in hallways performing a discretionary function and entitled to immunity in suit brought by student in classroom injured by another student).

[339] 616 P.2d 1376 (Haw. 1980).

[340] 232 S.E.2d 336 (S.C. 1977).

(4) Instruct students regarding the specific safety hazards on school facilities that are to be reported, e.g., water on floor, broken stair treads, broken desks, glass or sharp stones on playground, malfunctioning equipment, strangers in the building.

(5) Permit faculty to supervise activities only if their qualifications are sufficient for the level of risk of the subject area being supervised.

CHAPTER II

INSTITUTION, STUDENT AND FACULTY RELATIONSHIPS: CONSTITUTIONAL AND CONTRACTUAL CONSIDERATIONS

Introduction

One of the important, but by no means only, relationships between an institution and its faculty and students concerns standards of conduct. Adherence to appropriate standards of conduct applies in a broad sense to penalties resulting from academic or disciplinary sets of facts.[341] The subjects of student and faculty conduct have normally been treated separately in the public sector.[342] But there are several reasons why student and faculty conduct in nonpublic schools can legitimately be considered together. First, the constitutional substantive and procedural constraints affecting public schools are generally not applicable to nonpublic schools.[343] Second, nonpublic school student and faculty rights alike are generally contractual in nature, expressed in or implied from written documents such as applications, promotional literature, and handbooks.[344] Third, although contractual rights for faculty in nonpublic schools could involve more substantive and procedural due process rights than for students, the contractual rights of both students and faculty are often very similar in their nature and extent.[345]

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[341] For a discussion of the difference between academic and disciplinary misconduct, see MAWDSLEY, ACADEMIC MISCONDUCT: CHEATING AND PLAGIARISM 45-52 (NOLPE 1994).

[342] *See* separate treatment of employment and students in S. THOMAS (ed.) THE YEARBOOK OF EDUCATION LAW 1993 (NOLPE 1994). *See also* R. PHAY, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS (NOLPE 1977); F. DELON, LEGAL CONTROLS ON TEACHER CONDUCT: TEACHER DISCIPLINE (NOLPE 1977).

[343] *See generally* VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE Vol. 2, 337-38 (1985).

[344] *E.g.*, *see* R. Mawdsley, *Comparison of Employment Issues in Public and Private Higher Education Institutions*, 65 EDUC. L. REP. 669 (1991).

[345] The limitation or expansion of student and faculty rights seem to go hand-in-hand in nonpublic institutions. *Cf.* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (religious university with rigid student and faculty conformity to rules and no faculty tenure) *with* Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (religious university with faculty tenure and well-established and independent student senate recognition of student groups). However, even though both universities had quite different approaches to the nature of faculty and student rights, both ran afoul of established public policies. Bob Jones University for

Fourth, the relative dearth of reported cases involving private school rights when compared with the multitude of cases in the public sector makes the consideration of faculty and students together more feasible.[346]

Constitutional Constraints

The substantial freedom of nonpublic schools from the constitutional constraints that have plagued public sector attempts at discipline for the past twenty years has become a mixed blessing to nonpublic schools.[347] Because nonpublic school officials are usually aware that they are virtually immune from constitutional due process requirements, such officials have often not adequately evaluated their school materials which form the basis of student and faculty contractual relationships with the school. It is not unusual to find nonpublic school applications, promotional materials, and handbooks that contain language which is incomplete, inconsistent, or inaccurate. The contractual nature of nonpublic school relationships requires continuous monitoring by competent legal counsel if school policies and procedures are to be adjusted to changes in judicial constructions of contracts. One source has ably expressed the nonpublic school's legal responsibility as follows:

> Critical to preventive planning is periodic review of institutional policies and practices. Many institutions develop a faculty handbook and assume the handbook contains all of the appropriate policies relating to personnel and institutional concerns. Rarely is this the case. Practices change as do federal and state statutory and regulatory requirements, all of which necessitate constant revision of faculty handbooks. Similarly student affairs policies should be reassessed periodically to ensure that they conform to institutional requirements and reflect fair process. Sometimes institutions follow practices that are inconsistent

racial discrimination among students and Georgetown University for discrimination against students based on sexual orientation.

[346] The reluctance of parents and students, especially those in religious schools, to sue their institutions is an undocumented but probably quite real constraint. *See generally*, Valente, *supra* note 343, Vol. 1 and 2, for the considerably fewer number of pages needed to discuss nonpublic school law as compared with public school law.

[347] The watershed of public sector student and teacher rights has usually been attributed to Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("students, and teachers, [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). For an analysis of *Tinker* in light of the more recent Supreme Court decisions in Hazelwood Sch. Dist. v. Kuhlmeier, 108 S. Ct. 562 (1987), Bethel Sch. Dist. v. Fraser, 106 S. Ct. 3159 (1986), and New Jersey v. T.L.O., 105 S. Ct. 733 (1985), *see* R. MAWDSLEY AND A. MAWDSLEY FREE EXPRESSION AND CENSORSHIP: PUBLIC POLICY AND THE LAW (NOLPE 1988).

> with their policies; if this is the case, then either the practice should be changed to reflect policy or the policy should be changed so that it conforms to the practice.[348]

The immunity of nonpublic schools from the constitutional restraints that have plagued public institutions is the result of general inapplicability of the Fourteenth Amendment to nonpublic schools.[349] The most frequently used statutory provision to attempt to bring nonpublic schools within the aegis of constitutional substantive and procedural rights has been section 1983 of the Civil Rights Act.[350] However, section 1983, like the Fourteenth Amendment, applies only where there is state action. In the absence of official state action, plaintiffs have attempted to argue one or more of several theories by which otherwise private activity might be deemed state action for federal jurisdictional and constitutional purposes:[351] the state entanglement theory;[352] the state or public function theory;[353] and the symbiotic relationship theory.[354] An example of the subtle nuances that courts can invoke to avoid section 1983 liability is reflected in *Imperiale v. Hahnemann University*[355] where a medical school student, whose degree had been revoked by the university, had no section 1983 cause of action because the

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[348] LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES II, 2-3 (K. Weeks, ed. 1983).

[349] The Fourteenth Amendment, through which the substantive and procedural rights in the Bill of Rights are made applicable to the states, provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For the substantive and procedural rights applicable to public institutions, see *generally* Valente, *supra* note 343, Vol. I, at 259-312.

[350] 42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ."

[351] For a discussion of the following three theories, see Huff v. Notre Dame High Sch., 456 F. Supp. 1145 (D. Conn. 1978).

[352] *See* Howard v. Pine Forge Academy, 678 F. Supp. 1120 (E.D. Pa. 1987) (compliance with state requirement applicable to all public and private schools not state action); Vincent v. Western Technical Corp., 828 F.2d 563 (9th Cir. 1987) (reception of all funds from federal government to perform contract work according to federal standards not state action where regulations had no bearing on personnel policies).

[353] *See* Hawkins v. NCAA, 652 F. Supp. 602 (N.D. Ill. 1987) (NCAA regulatory function not traditionally and exclusively a state function even though public interest may be served); Transport Careers v. National Home Study Council, 646 F. Supp. 1474 (N.D. Ind. 1986) (accreditation duties not traditionally a state function).

[354] *See* Stone v. Dartmouth College, 682 F. Supp. 106 (D.N.H. 1988) (no symbiotic relationship between private college and state so that college disciplinary action against students who had torn down structures protesting investment in South Africa constituted a substitution for state criminal prosecution).

[355] 776 F. Supp. 189 (E.D. Pa. 1991), *aff'd* 966 F.2d 125 (3d Cir. 1992).

contacts between the Commonwealth of Pennsylvania and the medical school were considered to be "state-aided," rather than "state-related."

In order for any of the state action theories above to support a finding of state action, at least one of the tests in *Blum v. Yaretsky*[356] must be met: (1) the extent to which the private entity is subject to state or federal regulation (however, the mere presence of regulations will not create state action); (2) the sufficiency of a close nexus between state and private entities so that action of the latter is treated as that of the former; (3) the presence of such a coercive power or such significant encouragement from the state that private decisions are essentially those of the state. In *Milonas v. Williams*,[357] former students successfully brought a section 1983 action against a nonpublic school for youths with behavioral problems for its use of a behavioral modification program because "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions."[358] In *Milonas*, involuntary placement of students by a juvenile court in the school, detailed learning contracts between the nonpublic school and public school districts, state funding for tuition, school promotion of state funding for tuition, school promotion of state funding in its promotional literature, and a number of applicable state regulations were collectively held to constitute state action. Similarly, in *Braden v. University of Pittsburgh*,[359] incorporation of that once private university into the state university system with one-third of funds paid by that system provided sufficient contacts for state action. In *Jackson v. Statler Foundation*,[360] a private charitable foundation was found to be subject to section 1983 because the foundation was substantially dependent upon its congressionally permitted tax-exempt status, the IRS regulatory scheme was both detailed and intrusive, the appointment of governing committee members involved selections by public officials, and private foundation activities were presumed to be public functions.[361]

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[356] 457 U.S. 991 (1982) (section 1983 remedy denied Medicaid patients transferred or discharged from private nursing homes without benefit of notice or hearing because, despite extensive state regulations for nursing homes encouraging them to reduce costs, the ultimate decisions about patients was left up to the nursing homes).

[357] 691 F.2d 931 (10th Cir. 1982), *cert. denied* 460 U.S. 1069 (1983).

[358] Id. at 940.

[359] 343 F. Supp. 836 (W.D. Pa. 1972), *rev'd* 477 F.2d 1 (3d Cir. 1973), *on remand* 392 F. Supp. 118 (W.D. Pa. 1975).

[360] 496 F.2d 623 (2d Cir. 1974). *See also* Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984) ("symbiotic relationship" between University of Pittsburgh, Temple University, and State of Pennsylvania made the two institutions subject to section 1983 lawsuits).

[361] *Id.* at 634. For discussion of the special treatment of private foundations, see S. SOKOLOF, POLITICAL ACTIVITIES OF PRIVATE FOUNDATIONS AND M. PHELAN, EXCESS BUSINESS HOLDINGS OF PRIVATE FOUNDATIONS, TAX EXEMPT ORGANIZATIONS, I, 3187-93, 3263-69 (Prentice Hall 1984).

Notwithstanding the dissimilarity between private foundations and nonpublic schools, the *Jackson* court enumerated five helpful factors regarding determination of state action:

(1) the degree to which the private organization is dependent on government aid;

(2) the extent and intrusiveness of the governmental regulatory scheme;

(3) whether the regulatory scheme connotes government approval of the activity or merely provides assistance to all organizations without such connotation;

(4) the extent to which the organization serves a public function or acts as a surrogate for the state;

(5) whether the organization has legitimate claims to recognition as a private organization in associational or other constitutional terms.

Generally though, the section 1983 status of nonpublic schools continues to be controlled by *Rendell-Baker v. Kohn*.[962] In *Rendell-Baker*, the United States Supreme Court refused to find state action despite the fact that the defendant nonpublic school for maladjusted high school students received virtually all of its referrals from public school districts, received at least ninety percent of its operating budget from state and federal funds, and had to comply with a variety of regulations common to all public schools such as record keeping, student-teacher ratio, maintenance of job descriptions, and written statements describing personnel standards and procedures.

A federal appeals court has ruled on the section 1983 status of a private college since Rendell-Baker. In *Albert v. Carovano*,[963] students who had occupied the college's administration building for a weekend were suspended under college rules. New York required every college and university in the state to submit rules adopted by the institution's governing body pertaining to maintenance of public order and providing ejections, suspension, expulsion, or other appropriate action for infractions. However, the state requirement was an insufficient nexus to support a section 1983 claim because the state's role was "merely to keep on file rules submitted by colleges and universities" and the state "never sought to compel schools to enforce these rules and has never even inquired about enforcement."[964]

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[962] 102 S. Ct. 2764 (1982).

[963] 851 F.2d 561 (2d Cir. 1988).

[964] *Id.* at 568. However, the court did observe that inconsistent enforcement of the schools' rules to blacks and Latins might be the basis for a claim under section 1981 of the Civil Rights Act. *Id.* at 573, citing to Bernbaum v. Trussell, 347 F.2d 86, 90 (2d Cir. 1965).

The *Albert* result is fairly typical of judicial reluctance to transform minimal state contacts into state action and to thus bring nonpublic schools within the constitutional net. State contacts which do not constitute state action include:

(1) Reception of state and/or federal assistance;[365]

(2) Accreditation or state licensure;[366]

(3) Granting of a state charter;[367]

(4) Certification of teachers;[368]

(5) Tax exemption;[369]

(6) Filing of state forms;[370]

(7) Performance of a public function, viz., education.[371]

The effect of finding no state action for schools is that the applicable standards in a nonpublic institution's dealings with students and employees will be determined by contract rather than by state or federal constitutions. However, constitutional concepts are frequently interposed by litigants when educational institutions seek to enforce contractual terms. One important due process constitutional standard with two different aspects is that of notice.[372] Notice can mean sufficient forewarning by a rule so that a student or employee can reasonably anticipate the type of misconduct covered. But notice can also mean an opportunity for a student or employee to know the nature of the charges against him and the evidence supporting those charges.

While nonpublic educational institutions may not have to meet constitutional standards of due process in dealing with students or employees, courts

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[365] *Rendell-Baker*, *supra* note 362; Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985); Murphy v. Villanova Univ., 547 F. Supp. 512 (E.D. Pa. 1982); Grafton v. Brooklyn Law Sch., 478 F.2d 1137 (2d Cir. 1973).

[366] Huff v. Notre Dame High Sch., 456 F. Supp. 1145 (D. Conn. 1978); Geraci v. St. Xavier High Sch., 13 Ohio Op. 3d 146 (Ohio 1978); Bright v. Isenbarger 314 F. Supp. 1382 (N.D. Ind. 1970).

[367] Fischer v. Driscoll, 546 F. Supp. 861 (E.D. Pa. 1982); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971).

[368] *Geraci*, *supra* note 366.

[369] *Bright*, *supra* note 366; Brown v. Mitchell, 409 F.2d 592 (10th Cir. 1969).

[370] *Albert*, *supra* note 363; *Bright*, *supra* note 366.

[371] *Huff*, *supra* note 366; Berrios v. Inter-American Univ., 409 F. Supp. 769 (D.P.R. 1975), *appeal dismissed* 426 U.S. 942 (1975); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

[372] *See* Phay, *supra* note 342 at 4-10. *See also* Goss v. Lopez, 419 U.S. 565 (1975) where a suspension of ten days or less for a public school student requires notice of charges, explanation of evidence against a student and an opportunity in an informal hearing for the student to present his side.

seem quite willing to impose upon the disciplinary options of such schools a general sense of fairness.[373] In *Aronson v. North Park College*,[374] the court upheld a student dismissal where the student had been diagnosed as a chronic paranoid and had refused to appear for treatment. Apparently, because of the student's uncooperative attitude, the court found no infirmity with the school catalog provision permitting dismissal where a student is "undesirable and whose continuation in the school is detrimental to himself or his fellow students."[375] A troublesome companion catalog provision that "dismissal may be made without specific charges"[376] was not at issue under the facts of this case. Nonetheless, in an earlier and perhaps less enlightened decision, a court upheld an expulsion of two university students who were married in a civil ceremony, as well as two students acting as their witnesses, under a university regulation stating that "in conformity with ideals of Christian education and conduct the university reserved the right to dismiss a student at any time on whatever grounds the university judged advisable."[377] The case is silent as to whether the four students actually knew this civil ceremony violated school policy.

A more helpful guideline is found in *Geraci v. St. Xavier High School*.[378] In *Geraci* a student's expulsion was upheld where the school catalog listed as grounds for expulsion, "conduct detrimental to the reputation of the school" and "immorality in talk or action." Although the *Geraci* court found no state action so as to invoke section 1983 constitutional safeguards, the court did balance the general language in the rule against the nature of the student's conduct and the fair treatment accorded the student. The expelled student in *Geraci* had aided another student who threw a pie in the face of a teacher monitoring an exam. When he was called to the office, the student admitted complicity in the act and was notified he that was expelled. However, the expulsion did not become final until after a series of discussions occurred among various school officials and between the school president and the student's father. The *Geraci* court's standard for substantive and procedural fairness in nonpublic schools is a clear and concise statement of the current status of the law:

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[373] *See* Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984) where the appeals court appeared to have applied a quasi-constitutional fairness standard in interpreting the university's handbook regarding punishment of a student for cheating. For an analysis of *Corso*, *see* R. MAWDSLEY, ACADEMIC MISCONDUCT: CHEATING AND PLAGIARISM 51-52 (NOLPE 1994).

[374] 418 N.E.2d 776 (Ill. App. Ct. 1981).

[375] *Id.* at 782.

[376] *Id.*

[377] Carr v. St. John's Univ., 187 N.E.2d 18 (N.Y. App. Div. 1962).

[378] *Supra*, note 366.

> Although . . . a nonpublic school's disciplinary proceedings are not controlled by the due process clause, and accordingly such schools have broad discretion in making rules and setting up procedures for their enforcement, nevertheless, under its broad equitable powers a court will intervene where such discretion is abused or the proceedings do not comport with fundamental fairness.[379]

Fundamental fairness must still be provided students or employees even if they are being penalized for acts protected or not punished in the public sector. In *Rendell-Baker v. Kohn*[380] dismissal of a teacher was upheld even though she "was dismissed as a legitimate exercise of her free speech and [even though] her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State."[381] Likewise, in *Flint v. St. Augustine High School*,[382] the expulsion of two students was upheld when they violated a school rule prohibiting smoking within two blocks of the school. The rule specifically provided for a fine after the first offense and dismissal after a subsequent violation. Despite the fact that prior student repeat offenders had always been fined and no one had ever been dismissed for smoking, the expulsion of the student plaintiffs was upheld because the court observed:

> we cannot say that such a penalty was beyond the scope of the disciplinary powers granted to the principal and acknowledged to be clearly within his authority and discretion . . . [B]oth young men were on notice of the result which would ensue upon their next violations of the smoking rule. When the specific dismissal precipitating violations did, indeed, occur, the young men were confronted by their accusers and the record offers no indication that these specific accusals were unjustly or erroneously made.[383]

The minimal safeguards provided the plaintiffs of notice of offense, notice of punishment and opportunity to present their side satisfied the court's sense of fairness:

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[379] *Id.* at 149.

[380] 102 S. Ct. 2764 (1982).

[381] *Rendall-Baker*, 488 F. Supp. 764, 765 (D. Mass. 1980). The evolution of public employee free expression rights can be observed in the cases of Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher has free speech right to make public statements); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (teacher disciplined as result of free speech must prove motivating purpose for discipline was his exercise of free speech); Connick v. Myers, 461 U.S. 138 (1983) (public employee's free speech right applies only to matters of "public concern").

[382] 323 So. 2d 229 (La. Ct. App. 1976).

[383] *Id.* at 234, 235.

> [P]rivate institutions like St. Augustine High School have a *near* absolute right and power to control their own internal disciplinary procedure which, by its very nature, includes the right and power to dismiss students. That is not to say that due process safeguards can be cavalierly ignored or disregarded. But if there is *color of due process* that is enough.[384]

Even handbook requirements may have to be read in terms of a standard of arbitrariness. In *Ahlum v. Administrators of Tulane Educational Fund*,[385] the Louisiana Court of Appeals determined that, absent state action, a private university's adherence to its student discipline requirements was not to be decided by constitutional standard. Despite a university requirement that a tape recording of a student disciplinary hearing be made, the absence of a hearing transcript for an appeal due to failure of a tape recorder was not fatal as long as the student had an opportunity to present his version of the facts and was informed of the charges against him. A court will not "substitute its own view of appropriate standards of conduct or appropriate penalties for the breach of those standards in place of a private university's decision . . . Instead the disciplinary actions of a private university may be viewed for arbitrary and capricious action."[386]

Nonpublic institutional discipline will generally not be considered improperly arbitrary or capricious as long as it conforms to published regulations.[387] However, one unusual case where constitutional and contractual standards were equated was *Franklin v. Leland Stanford, Jr. University*.[388] In *Franklin*, a tenured faculty member's dismissal for 1971 speeches, which encouraged physical damage to the University's computer center and which prolonged student disruption, was upheld, but only after applying the *Pickering* constitutional free speech balancing test[389] and the *Mt. Healthy*

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[384] *Id.* at 234-35 (emphasis added).

[385] 617 So. 2d 96 (La. Ct. App. 1993).

[386] *Id.* at 98, 99.

[387] Allen v. Casper, 622 N.E.2d 367, 371 (Ohio Ct. App. 1993) (dismissal of two elementary age children because of unacceptable parent behavior upheld by court; "Absent a clear abuse of discretion by the school in the enforcement of its policies and regulations, courts will not interfere in these matters"); Galiani v. Hofstra Univ., 499 N.Y.S.2d 182 (N.Y. App. Div. 1986) (student's due process to which he was entitled prior to suspension was institution's conformity to its disciplinary procedures.)

[388] 218 Cal. Rptr. 228 (1985).

[389] Pickering v. Board of Educ., 391 U.S. 563 (1968) (balancing test involves consideration of the following factors: (1) whether the communication would interfere with close working relationships; (2) whether communication would provoke conflict or otherwise undermine the employer's operations; (3) whether the communications concerned a topic of public interest; (4) whether there was an opportunity to rebut or refute any errors in the communication; (5) whether the communication shows the employee's incompetence at his position; (6) whether the communication was intentionally false).

mixed motive test.[390] Without deciding the seminal question as to whether First Amendment free speech applies to private schools, the *Franklin* court applied constitutional due process standards to the University because the faculty members had been accorded the same constitutional protection as would have been provided by a state university and because the university declared that the outcome would be the same whether it was viewed as a private or a public employer. This gratuitous gesture by Stanford University raises two important legal questions: whether existence of contractual due process equal to constitutional due process automatically invokes a constitutional analysis,[391] or whether an institution must affirmatively assert that its contractual standards are equal to constitutional ones before a constitutional analysis will be performed.[392] A sounder approach would seem to be reflected in *Kyriakopoulos v. George Washington University*,[393] where a private university's status did not shield the university from First Amendment scrutiny regarding faculty promotion, but from the scrutiny necessary to ensure that the University performed its contractual duty.

The following guidelines and suggestions may be helpful in assessing a nonpublic school's limitations on enforcing its rules and policies.

(1) Substantive constitutional rights, e.g. speech, association, press, can be defined and limited by nonpublic schools. Courts will not inquire into the reasonableness of rules or policies unless they are contrary to an established or fundamental public policy.[394] However, where a public policy is contravened, courts will not invalidate the school's rule or policy but will deny the nonpublic school access to a benefit[395] or will require the school to confer a benefit.[396]

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[390] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 276 (1977) (even if an employee meets her burden of proof in producing evidence of employer action based on employee's protected constitutional rights, the employer can still prevail if it can show by a preponderance of the evidence "that it would have reached the same decision . . . even in the absence of the protected conduct.")

[391] *But cf.* Galiani v. Hofstra Univ., 499 N.Y.S.2d 182 (N.Y. App. Div. 1986) (only due process to which student entitled prior to suspension was institution's conformity to its own disciplinary procedures).

[392] *See* Life Chiropractic College v. Fuchs, 337 S.E.2d 45 (Ga. Ct. App. 1985) (college bulletin statement that "due process is followed in all disciplinary cases" had been met in a student discipline situation even though the student had been denied a request to confront witnesses).

[393] 866 F.2d 438 (D.C. Cir. 1989).

[394] *See* discussion on *Government and Fundamental Public Policies* in chapter, "Governmental Regulation of Nonpublic Schools".

[395] Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (revocation of tax exempt status); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (denial of student eligibility for VA benefits).

[396] Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (homosexual groups must be provided tangible benefits). *See also* Roberts v. United States Jaycees, 468 U.S. 609 (1984) (women must be admitted to full membership).

(2) Whatever constitutional standards apply to nonpublic schools will apply equally to faculty and students. Courts consistently view nonpublic school faculty and student rights as controllable on a contractual theory by the school officials. As long as minimal procedural safeguards are provided with a view toward fairness and as long as additional contractual rights accorded faculty and students in school handbooks are honored, courts do not appear to require more rigid standards. For religious nonpublic schools, there may be the additional First Amendment protection from unnecessary intrusion into internal doctrinal matters.[87]

(3) Minimal procedural safeguards required by an equitable sense of fairness are notice of the kinds of conduct prohibited by school rules, notice of possible punishment, e.g. contract termination or expulsion, and notice of opportunity for the student or faculty member to present his side of the case. Nonpublic institutions are bound by their published guidelines or rules,[88] and enforcement will be upheld as long as such

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[87] See McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.), *cert. denied* 409 U.S. 896, (1972) (refusal to promote female ordained minister not subject to Title VII investigation because "an investigation . . . would . . . cause the State to intrude upon matters of church administration and government"); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992) (inquiry into polity impermissible where discharged faculty member performed a ministerial function); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (inquiry denied into theological belief prohibiting hiring of woman as associate pastor because "[i]n quintessentially religious matters, the free exercise clause of the First Amendment protects the act of a decision rather than the motivation behind it."); Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd* 814 F.2d 1213 (7th Cir. 1987) (female applicant with theological views antithetical to Catholic Church beliefs did not have to be offered theology department teaching position); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (discharge of hospital chaplain not subject to ADEA and Title VII scrutiny because "to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made." Walker v. First Presbyterian Church, 22 FEP 762, 763 (Cal. Super. Ct. 1980) (city ordinance prohibiting discrimination on basis of sexual orientation not applicable to church organist position where "organist in a congregation is part of the worship team"). *But see* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 330, 331 (3d Cir. 1993) (fifty-year-old teacher discharged from Catholic school after marrying divorced man had ADEA claim. "[A] court could adjudicate [plaintiff's] claim without the entanglement that would follow were employment of clergy and religious leaders involved . . . [The court is not forced] to choose between parties' competing religious visions . . . [where plaintiff does not] challenge the validity, existence or plausibility of a preferred religious doctrine . . .")

[88] See Berlis v. Albany Medical College, 525 N.Y.S.2d 932 (N.Y. App. Ct. 1988).

enforcement is not arbitrary.[399] While the right to counsel, the right to cross-examine witnesses, and the right to an appeal would not probably be included as part of fundamental fairness imposed on nonpublic schools, those schools most likely would not survive a challenge to a hearing which did not involve an impartial person or tribunal deciding the case.[400] However, a better policy would seem to be to permit cross-examination[401] and an appeal to someone beyond the first decision making level.

(4) School rules or procedures which conform to equitable standards of fairness will not immunize a nonpublic school from administrative judicial review under various state or federal statutes.[402]

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[399] *See* Rosen v. Vassar College, 525 N.Y.S.2d 340 (N.Y. App. Div. 1988) (president's interpretation of "evidence of sound scholarship" could differ from department recommendations and was controlling in absence of bad faith); Levi v. University of Tex. at San Antonio, 840 F.2d 277, 281 (5th Cir. 1988) (denying tenure to plaintiff for awarding too many high grades and granting tenure to another faculty member for awarding low grades did not violate equal protection; the "University's decision [may be] unwise but [it was] not irrational"); Kyriakopoulos v. George Washington Univ., 657 F. Supp. 1525 (D.D.C. 1987) (test in private educational institution for failure to promote faculty member is "gross arbitrariness"). *But compare* McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987) (review of tenured professor for refusal to teach assigned class not limited to whether decision was "arbitrary, irrational or infected by improper motivation"). *See also* Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982) (cancellation of divorced Catholic lay teacher's contract prior to beginning of school year upheld because the teacher's educational background in Catholic seminary and graduate programs should have alerted him to divulge his divorced status on employment application).

[400] However, in the public sector a hearing is considered impartial unless there is evidence of actual personal bias or partiality. Rouse v. Scottsdale Unified Sch. Dist., 752 P.2d 22 (Ariz. Ct. App. 1988); State Tenure Comm'n. v. Randolph County Bd. of Educ., 523 So. 2d 1076 (Ala. Civ. App. 1988); Plymouth-Canton Community Sch. Dist. v. State Tenure Comm'n., 419 N.W.2d 783 (Mich. Ct. App. 1988). For a good example of a careful deliberative process in a student expulsion case, *see* Geraci v. St. Xavier High Sch., 13 Ohio Op. 3d 146 (Ohio 1978).

[401] *See* Life Chiropractic College v. Fuchs, 337 S.E. 2d 45 (Ga. Ct. App. 1985) (college bulletin specifying that "due process is followed in all disciplinary cases" was met even though student accused of falsifying grades was denied request to confront witnesses but only because of solid evidentiary support for college's conclusions.)

[402] *E.g. see* Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993) (private law school subject to OCR jurisdiction under ADA); Stouch v. Brothers of Order of Hermits of St. Augustine, 836 F. Supp. 1134 (E.D. Pa. 1993) (monastery subject to EEOC jurisdiction under ADEA); EEOC v. Mississippi College, 451 F. Supp. 564 (S.D. Miss. 1978) *rev'd in part* 626 F.2d 477 (5th Cir. 1980); EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980) *rev'd in part* 651 F.2d 277 (5th Cir. 1981) (religious institutions subject to jurisdiction of EEOC under Title VII); Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983) (church subject to Department of Labor jurisdiction to enforce FLSA minimum wage requirements); Christ the King Regional High Sch. v. Culvert, 815 F.2d 219 (2d Cir. 1987), *cert. denied* 108 S. Ct. 102 (1988); Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985) (religious schools subject to jurisdiction of state labor boards to require collective bargaining).

Contractual Constraints

In nonpublic education, the relationship between the institution and parents, students, or employees is generally recognized to be one of contract. A school's contract normally will include application forms, brochures, handbooks, and school board policies,[403] although an institution may elect not to include such documents in the contract.[404]

Principles of contract law are generally equally applicable to nonpublic and public institutions; therefore, public school cases can often be valuable in assessing nonpublic school obligations even though public school standards may be established by statute rather than simply by the contract. Contract problems tend to involve one or more of three issues:

(1) whether allegedly improper student or faculty conduct is covered by published contract language;

(2) whether the school has complied with its own contractual requirements in dealing with students or faculty;

(3) whether the school's interpretation or enforcement of contract terms exhibited good faith and fairness.

Regarding the first issue, even general contract language will support faculty or student discipline provided that the faculty member or student knew or reasonably should have known his or her conduct was included within the contract terms. In *Aronson v. North Park College*,[405] a student's dismissal was upheld under a college catalog provision allowing the college "to dismiss at any time a student who in its judgement is undesirable and whose continuation in the school is detrimental to himself or his fellow students."[406] The student, after being diagnosed as paranoid and a serious detriment to herself and others, refused to cooperate with remediative efforts.

The status of nonpublic educational employees is difficult to assess when compared with public employees. Generally, nonpublic employees would have no more equitable expectations of fairness than a nontenured public

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[403] *E.g.*, see Moffice v. Oglethorpe Univ., 367 S.E.2d 112 (Ga. Ct. App. 1988) (faculty handbook incorporated by reference into contract).

[404] See Wall v. Tulane Univ., 499 So. 2d 375 (La. Ct. App. 1986) (university's change in tuition waiver benefit not violative of employment contract because such benefits were in staff handbook which was not part of contract); Shannon v. Bepko, 684 F. Supp. 1465 (S.D. Ind. 1988) (handbook did not apply to hourly employee); Goodkind v. University of Minn., 417 N.W.2d 636 (Minn. 1988) (selection procedures set forth in dental school's statement of policy not part of faculty member's contract); Dunfey v. Roger Williams Univ., 524 F. Supp. 18 (D. Mass. 1981) (a personnel manual that could be altered or revoked at any time by the administration does not create any contractual rights).

[405] 418 N.E.2d 776 (Ill. App. Ct. 1981).

[406] *Id.* at 781.

employee,[407] except that even public nontenured employees would also have some constitutional rights.[408] To the extent that nonpublic employees do not serve under a contract of fixed duration, they may only be employees-at-will and thus subject to dismissal at any time.[409] Absent nonpublic contractual limitations to the contrary, reasons for public employee discipline can provide some guidelines for nonpublic schools regarding judicial interpretation of general grounds for discipline. In the public sector, a wide variety of tenured teachers' conduct has been found to support charges of unprofessional conduct, unfitness, and willful neglect of duty or insubordination, invariably on the theory that the conduct was outside the established professional norms for teachers. Teacher dismissals have been upheld where a teacher: altered student scores on statewide examinations;[410] showed an uncut R-rated movie;[411] displayed sexually explicit material;[412] improperly monitored or used school district finances;[413] employed improper student

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[407] Absent specific contractual rights, a nontenured public employee has no protected property or liberty interest in continued employment. *See* Paul v. Board of Trustees of City Univ. of New York, 464 N.Y.S.2d 953 (N.Y. Sup. Ct. 1983) (no reasons need be given for denial of reappointment); Wells v. Doland, 711 F.2d 670 (5th Cir. 1983); Harrison v. Ayers, 673 F.2d 724 (4th Cir. 1982) (no expectations of de facto tenure).

[408] A public employee, contrary to a nonpublic employee, does have free speech rights. *See* Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983) (advising student to seek legal advice about his suspension); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982) (appeal to AAUP for relief and representation); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982) (written criticism of administration's maternity leave policy and refusal to prepare outline for course faculty member was not teaching).

[409] *See* Roberts v. Wake Forest Univ., 286 S.E.2d 120 (N.C. Ct. App. 1982) (contract for indefinite period of time considered to be employment-at-will under North Carolina law). For the same analysis in the public sector, see Strother v. Columbia-Brazoria Indep. Sch. Dist., 830 F. Supp. 459 (S.D. Tex. 1993) (public school employee without written or oral contract identifying length of employment was employee-at-will with no property rights and thus could be terminated under state law without cause). However, the employment-at-will doctrine has important exceptions restricting dismissal or discipline in the cases of public policy, implied contract, and covenants of good and fair dealing. *See* I. SHEPARD, H. OLSEN AND R. DUSTIN EMPLOYMENT AT WILL: A GUIDE TO AN ERODING DOCTRINE (CUPA 1987).

[410] Carangelo v. Ambach, 515 N.Y.S.2d 665 (N.Y. App. Div. 1987); Carlan v. Lawrence Union Free Sch. Dist. Bd. of Educ., 513 N.Y.S.2d 202 (N.Y. App. Div. 1987) (additional charges included insubordination, failure to prepare and grade certain tests, and neglect of duty).

[411] Fowler v. Board of Educ. of Lincoln County, 819 F.2d 657 (6th Cir. 1987).

[412] State v. Parker, 592 A.2d 228 (N.J. 1991).

[413] Duffy v. Poughkeepsie City Sch. Dist., 583 N.Y.S.2d 658 (N.Y. App. Div. 1992) (receiving improper cash advances); State v. Peters, 815 S.W.2d 161 (Tenn. 1991) (improperly using designated federal and state funds for operational expenses); Fosderaro v. School Dist. of Phila., 513 A.2d 570 (Pa. Commw. Ct. 1987) (making personal purchases using school district tax exempt status).

discipline;[414] encouraged students to drink alcohol or smoke marijuana;[415] was convicted of crimes of moral turpitude;[416] was involved in immoral sexual conduct with students;[417] was insubordinate;[418] and harassed an administrator with phone calls.[419] In a distinctly nonpublic setting, a teacher's knowledge of a serious student violation (drunkenness) while failing to report it constituted good cause for contract termination.[420] In an intriguing religious case, a bishop terminated a principal during the term of his contract as a result of discord and disunity in the diocese. The court rejected the principal's breach of contract action for the balance of his salary because "it would infringe on ecclesiastical authority to deny the Bishop authority to dismiss the church school principal in order to end a schism in the congregation."[421]

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[414] Kramer v. Newman, 540 F. Supp. 325 (E.D. Pa. 1983) (use of physical force against students in violation of district's policy on corporal punishment); Catherine v. Board of Educ. of St. Louis, 822 S.W.2d 881 (Mo. Ct. App. 1991) (using profanity, shouting, chasing and physically handling children); Shepard v. South Harrison R-II Sch. Dist., 718 S.W.2d 195 (Mo. Ct. App. 1986) (striking children "about the head" instead of on the "fleshy posterior" and not in the presence of the principal as required by board policy); Juneau v. Louisiana Bd. of Elementary and Secondary Educ., 506 So. 2d 756 (La. Ct. App. 1987) (spraying handicapped student in face with cold water to calm student in violation of standard which required notification of supervisory personnel.)

[415] Barcheski v. Board of Educ. of Grand Rapids Pub. Sch., 412 N.W.2d 296 (Mich. Ct. App. 1987); White v. Board of Trustees of W. Wyo. Community College Dist., 648 P.2d 528 (Wyo. 1982).

[416] Board of Directors of the Lawton-Bronson Community Sch. Dist. v. Davis, 489 N.W.2d 19 (Iowa 1992) (shoplifting); Ellis v. Ambach, 508 N.Y.S.2d 624 (N.Y. App. Div. 1986) (hit and run death of teenager); *In re* Shelton, 408 N.W.2d 594 (Minn. Ct. App. 1987) (embezzlement from corporation formed with two other teachers); Samaan v. Trustees of the Cal. State Univ. and Colleges, 197 Cal. Rptr.2d 856 (Cal. Ct. App. 1983) (guilty plea for grand theft).

[417] Hall v. Board of Educ. of Chicago, 592 N.E.2d 245 (Ill. App. Ct. 1992); Fadler v. Illinois State Bd. of Educ., 506 N.E.2d 640 (Ill. App. Ct. 1987); Scott County Sch. Dist. 2 v. Dietrich, 489 N.E.2d 1170 (Ind. Ct. App. 1986); Gaziano v. Board of Amherst Exempted Village Sch. Dist., 513 N.E.2d 282 (Ohio 1987); Board of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986).

[418] Malverne Union Free Sch. Dist. v. Sobol, 586 N.Y.S.2d 673 (N.Y. App. Div. 1992) (teacher refusal to turn over lesson plans and grade books); Board of Educ. of Chicago v. Harris, 578 N.E.2d 1244 (Ill. App. Ct. 1991) (refusal to accept teaching assignment); Sinnott v. Skagit Valley College, 746 P.2d 1213 (Wash. Ct. App. 1987) (repeated use of profanity after direction to stop); Klein v. President and Fellows of Harvard College, 517 N.E.2d 167, 169 (Mass. Ct. App. 1987) (faculty member's acrimonious behavior including claim that dean confided only with those faculty members having the "most widely acknowledged mental problems"); Lockhart v. Arapahoe County Sch. Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986) (teacher refusal to take part in hall duty); King v. Elkins Pub. Sch., 733 S.W.2d 417 (Ark. Ct. App. 1987) (coach used volunteer noncertified coaches on sideline during game contrary to school rules).

[419] Schuster v. Babylon Union Free Sch. Dist., 526 N.Y.S.2d 191 (N.Y. App. Div. 1988).

[420] Watts v. St. Mary's Hall, 662 S.W.2d 55 (Tex. Ct. App. 1983).

[421] Black v. St. Bernadette Congregation of Appleton, 306 N.W.2d 550, 553 (Wis. Ct. App. 1984), citing for authority to Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976) (bishop's reason "to eliminate discord within a congregation" was ecclesiastical in nature rather than "purely secular.")

A second major problem area of contractual constraints concerns whether the nonpublic school has complied with its contractual requirements in dealing with students or faculty. The extent to which a written contract and its reference documents represent the fully integrated expression of the parties can present legal problems. Whether handbooks are part of an employee's contract may vary with institutions.[422] Special problems can result when one or more of the parties seeks to introduce statements or policies external to the contract, other than those found in handbooks. In *Welter v. Seton Hall University*,[423] two nuns stated a cause of action for improper discharge when the university sought to invoke several Catholic Canon Law provisions relating to the relationship between a cleric and superiors. In this case, the employment contract contained no condition that the nuns secure permission of religious superiors before seeking employment, and the contract contained no reference to Canon Law. In *Lewis v. Loyola University of Chicago*,[424] a faculty member was entitled to tenure when, among other letters, a preemployment letter from the Dean of the School of Medicine stated that "I will propose early approval of tenure for you . . . ,"[425] and he failed to do so. In accepting the faculty member's claim that the letters were part of the contract, the court expressly rejected the idea that "a form contract for a teaching position . . . embodied the complete agreement and understanding of the parties" as well as the school's claim that the letters were only "expressions of goodwill and [were] not an enforceable promise creating a contractual obligation."[426] Ambiguities in contract terms can lead to the introduction of oral evidence regarding past custom and usage in handling similar problems.[427]

Normally, the specific facts of each situation will govern the results. In

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[422] Handbook part of contract: Moffice v. Oglethorpe, 367 S.E.2d 112 (Ga. Ct. App. 1988) (faculty handbook incorporated by reference into contract); Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989) (college employee handbook part of contract but too ambiguous to support cause of action for breach of unilateral contract of employment); Dahlman v. Oakland Univ., 432 N.W.2d 304 (Mich. Ct. App. 1988) (failure of employee to exhaust grievance procedure in handbook prohibited breach of contract action). Handbook not part of contract: Wall v. Tulane Univ., 499 S.E.2d 375 (La. Ct. App. 1986) (university's change in tuition waiver not violative of employment contract because such benefits were in staff handbook which was not part of contract); Shannon v. Bepko, 684 F. Supp. 1465 (S.D. Ind. 1988) (handbook did not apply to hourly employee); Goodkind v. University of Minn., 417 N.W.2d 636 (Minn. 1988) (selection procedures set forth in dental school's statement of policy not part of faculty member's contract); Faur v. Jewish Theological Seminary of Am., 536 N.Y.S.2d 316 (N.Y. App. Div. 1989) (admission policies not part of faculty contract so seminary could alter policy and admit women).

[423] 608 A.2d 206 (N.J. 1992).

[424] 500 N.E.2d 47 (Ill. App. Ct. 1986).

[425] *Id.* at 48.

[426] *Id.* at 50.

[427] See Holland v. Kennedy, 548 So. 2d 982 (Miss. 1989) (evidence of past employment practices of college admissible to clarify ambiguous terms of express contract); Ozerol v. Howard Univ., 545 A.2d 638 (D.C. 1988) (no oral statements regarding pre-employment negotiations

Lindsey v. University of Arizona,[428] a head basketball coach was entitled to a large award of damages following his contract nonrenewal after one year on the basis of "statements of [the] Athletic Director . . . and some unidentified member of the search committee regarding the University's policy of giving coaches four years to prove their worth . . . ."[429] As previously noted in *Lewis*,[430] a faculty member was entitled to tenure because of a preemployment letter[431] in which the Dean indicated his intention to propose early tenure. The court rejected the university's claims that the letters were only "expressions of goodwill."[432] In *Harris v. Arizona Board of Regents*,[433] a faculty member was accorded de facto tenure on the basis of a preemployment statement by the Dean of the College of Liberal Arts that the faculty member would automatically receive tenure in his third year.

On the other hand, in *Bruner v. University of Southern Mississippi*,[434] some statements to a prospective coach by an athletic director suggesting that the coach would be hired, coupled with the reliance by the coach and his wife on those statements, were insufficient to create an enforceable contract. Mississippi state law provided that only the state board of trustees had the power to authorize teaching contracts, and therefore any preemployment representations were unenforceable. In a similar vein, the sending of letters of intent to teachers to determine whether they plan to return may be misunderstood by some to be a contract for employment. In *Knipmeyer v. Diocese of Alexandria*,[435] a letter of intent in which a school expressed to employees the salary which they might expect and inquired whether they planned to return, lacked a specific offer by either the employer or employee and therefore could not create a binding contract. Likewise, where a nonpublic school has a formal contract, a letter from the administrator to a teacher with words to the effect of "I am planning for you to be a part of our faculty next year" lacks the specificity characterized by the employment contract and is therefore unenforceable.[436]

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between faculty member and university admissible concerning tenure status where "Indefinite Status" could have been marked and it has not been so marked); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984), *after remand* 547 A.2d 144 (D.C. 1988) (evidence of prior practice in interpreting "previous appointment" term in Faculty Handbook not sufficient to sustain faculty member's claim to indefinite tenure based on only one example); Roberts v. Wake Univ., 286 S.E.2d 120 (N.C. Ct. App. 1982) (attempt by golf coach dismissed after 16 months unsuccessful in proving through custom and usage claim to contract for long term based on terms of prior coaches because a person employed for indefinite period of time considered to be employee-at-will).

[428] 754 P.2d 1152 (Ariz. Ct. App. 1987).

[429] *Id.* at 1157.

[430] 500 N.E.2d 47 (Ill. App. Ct. 1986).

[431] *Id.* at 48.

[432] *Id.* at 50.

[433] 528 F. Supp. 987 (D. Ariz. 1981).

[434] 501 So. 2d 1113 (Miss. 1987).

[435] 492 So. 2d 550 (La. Ct. App. 1986).

[436] Braun v. Glade Valley Sch., 334 S.E.2d 404 (N.C. Ct. App. 1985).

Confusion can result when a handbook appears to create a benefit but also gives the institution the right to alter the handbook at any time. In *Dunfey v. Roger Williams University*,[437] a discharged admissions officer sought to enforce the Personnel Policy Manual provision that an involuntarily discharged administrator was entitled to one month's salary for every six-month's service. However, the manual provided that "Additional policies and practices or changes may evolve and the Personnel Policy Manual may be amended, modified, or superseded at any time. Written notice of such changes will be distributed as soon as possible." In rejecting the former employee's claim, the court held that under Rhode Island law, "the Manual does not create any contractual rights between [the university] and [plaintiff] . . . because an employee cannot rely on statements in a manual if the manual can be altered or revoked at any time and for any reason . . . ."[438] Interestingly enough, the court chose not to treat provisions in the manual as part of the employment contract enforceable until such time as they were changed.

To avoid misunderstandings regarding contract language, the institution should inform the prospective employee as to which office authorizes contracts and the contract itself should state in bold print that the contract represents the total agreement between the parties. Since nonpublic institutions seem to prefer a provision in employment handbooks authorizing changes to be made at any time by the administration, the institution should either identify the handbook as not being part of the contract or else identify which parts of the handbook will be part of the contract, even if changes should be made. Where schools do not use written contracts but instead handle employees on an employment-at-will basis, the rights of such employees should be clearly identified, especially where the rights of employees-at-will may differ from those of other employees.[439]

A unique problem can arise where an employee under contract at a nonpublic school seeks to resign after the beginning of the school year in order to accept other educational employment. In *Weisfeld v. Peterseil School Corporation*,[440] after the beginning of the school year, a teacher under contract to a nonpublic school signed a contract with the public school. However, the nonpublic school administrator informed the teacher that he

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[437] 824 F. Supp. 18 (D. Mass. 1993).

[438] *Id.* at 22.

[439] *See* Steele v. Board of Educ. Inglewood Unified Sch. Dist., 251 Cal. Rptr. 360 (Cal. Ct. App. 1988) (director of personnel who served at pleasure of employer nonetheless entitled to minimal constitutional requirements of due process); Leikvold v. Valley View Community Hosp., 688 P.2d 170 (Ariz. 1984) (handbook which does not specifically state it is not part of employment contract creates implied obligation of employer to honor entire handbook if it selectively attempts to enforce only part of handbook against employee.)

[440] 623 So. 2d 515 (Fla. Dist. Ct. App. 1993).

would not release her from her contract. The public school district, which had a policy not to offer a contract to a teacher under contract to another school, withdrew its offer. The teacher sued the nonpublic school and its administrator for tortious interference with contract in refusing to release her from her contract and for breach of contract for refusing to permit her to serve out her nonpublic school contract. Although the nonpublic school and its administrator were not liable for tortious interference with contract, they were liable for breach of contract in refusing to permit the teacher to serve out that contract. In other words, the nonpublic school could not have it both ways; refusal to release the teacher was an implicit acknowledgement that an enforceable contract existed, and the teacher was thus entitled to serve out that contract even though the nonpublic school had hired someone else to replace her.

Problems of contract interpretation frequently arise where an educational institutions misstates its commitments, seeks to alter its commitment, or refuses to honor its commitment. In *Idrees v. American University of the Caribbean*,[441] a prospective medical student successfully sued the university on the theory of fraudulent misrepresentation. The university's medical school brochure advertised the school's library facilities, classroom microscopes and skeletons, student slides, and names of faculty, but through circumstances beyond its control, viz., delayed construction and faculty defections, the facilities were not ready when classes were scheduled to begin. The key problem seemed to be that the university failed to advise incoming students of its changed circumstances. In addition, the medical school brochure contained a picture of a nearby hospital but failed to explain that no relationship existed between the school and the hospital. In *Dezick v. Umpqua Community College*,[442] a student recovered $12,500 damages for promissory fraud and misrepresentation when he received assurance from school personnel that he would receive advanced welding training as advertised in the school catalog. During his three consecutive terms, none of the courses in the program was ever taught, either because equipment was inoperable or because it was on order. The recent private college case, *Britt v. Chestnut Hill College*,[443] drives home the obligation of nonpublic educational institutions to honor commitments to students. In *Britt*, a student for whom life experience credits had been granted by the college upon enrollment but were later revoked, had a cause of action for breach of contract. Considering the changing demographics among higher education student populations, the court's comment is worth reflecting upon:

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[441] 546 F. Supp. 1342 (S.D.N.Y. 1982).
[442] 599 P.2d 444 (Ore. 1979).
[443] 632 A.2d 557 (Pa. Super. Ct. 1993).

> The economic reality is that colleges and universities are competing to attract nontraditional age students and many of these institutions have designed programs to cater to them. Through advertising and recruitment campaigns, an increasing number of colleges and universities are promising students who wish to return to school, flexible schedules, evening and weekend classes, and academic credit for life experience. Students, in turn, attracted by these options, may seek to apply to a particular institution and inquire as to the requirements they will have to meet in order to achieve their degrees. When an individual is induced to enroll in a university or college based upon an award of certain life experience credits, the institution cannot then, after the student's enrollment, revoke those credits.[444]

Actions for breach of contract and misrepresentation can also exist where the school uses superior knowledge about an area and abuses its fiduciary relationship with a student. In *James v. SCS Business and Technical Institute*,[445] a student thought he was applying for $5100 in financial aid to cover tuition and books. Instead he signed documents for $4000 ALAS loan, a $2625 GSL loan, and a $1400 Pell Grant. The court held that the student could rescind the enrollment agreement. Although the school had returned $3187 after the student's withdrawal in October and it had retained $2400 to cover the cost of tuition prior to the student's withdrawal, the student was billed by the lender for $4928.85. The student was entitled to recover the $4928.25, because the enrollment agreement was unconscionable, and the $2400 for failure of consideration (many of instructors failed to show for class). It is hoped that the plight of this student is not typical of nonpublic school students in general, but the court's description of his predicament is worth repeating in light of the importance of financial aid to higher education.

> The relatively short duration of the enrollment interview, the sheer number of documents plaintiff was required to sign, the legal nature of those forms, plaintiff's eagerness to learn the promised skills [six month computer entry operator program], and his total reliance on the apparent expertise of [defendant's] enrollment support his testimony that he followed the school's advice to just sign the forms and trust them even though he did not understand what he was signing.[446]

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[444] *Id.* at 560.
[445] 595 N.Y.S.2d 885 (N.Y. Civ. Ct. App. 1992).
[446] *Id.* at 893.

Because virtually all nonpublic schools operate on a *quid pro quo* basis, exchanging tuition dollars for services, a failure to deliver services as promised either orally or in writing presents the kind of factual dispute courts are equipped to address. In *Van Loock v. Curran*,[447] parents stated a cause of action for breach of contract and fraud where they had paid a preregistration fee but were told on the last day of school, without a reason being given, that their sons would not be permitted to return the following year. Return of the preregistration fees did not necessarily refute "an inference that upon acceptance of the Van Loocks' registration, the school impliedly contracted to educate [their sons] for the upcoming school term in exchange for the Van Loocks' payment of preregistration fees and continued compliance with the school's rules and regulations."[448] Similarly, in *Squires v. Cambridge School*,[449] parents of a child enrolled in a private school stated causes of action in both breach of contract and misrepresentation when their child's learning disabilities were not remediated as promised by the school principal. Whether in providing services or in meting out discipline, nonpublic schools will be expected to act according to the contract.[450]

As a variation on *Van Loock*, a school may be contractually obligated to refund tuition if the child does not enroll[451] and parents may be responsible for an entire year's tuition and fees if they cancel registration for a reason not considered acceptable in the handbook.[452] Where the contract provides that no cancellation of a contract would be allowed and no refund made where parents unilaterally withdraw their child, the school may not even have an obligation to mitigate damages.[453] However, the presence of a liquidated damages clause in a school parent contract may affect the obligations of both

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[447] 489 So. 2d 525 (Ala. 1985).

[448] *Id.* at 529.

[449] 823 P.2d 256 (Nev. 1991).

[450] See Jones v. Howe Military Sch., 604 F. Supp. 122 (D. Ind. 1984) (misconduct justified nonenrollment second semester). For expulsion during life of contract for student violation of rules, see Thomas Jefferson Sch. v. Kapros, 728 S.W.2d 315 (Mo. Ct. App. 1987); Hutcheson v. Grace Lutheran Sch., 517 N.Y.S.2d 760 (N.Y. App. Div. 1987); Spell v. Bible Baptist Church, 303 S.E.2d 156 (Ga. Ct. App. 1983).

[451] Brenner v. Little Red Sch. House, 265 S.E.2d 607 (N.C. Ct. App. 1982) (school principal had made oral statement to one parent that tuition could be refunded, even though written school policy apparently would have not authorized the refund).

[452] See Princeton Montessori Soc'y v. Leff, 591 A.2d 685 (N.J. Super. Ct. App. Div. 1991); Bishop v. Westminster Sch., 397 S.E.2d 143 (Ga. Ct. App. 1990); Mowse v. Runnels Sch., 457 So. 2d 767 (La. Ct. App. 1984). *See also* Dr. Perkins Sch. v. Freeman, 741 F.2d 1503 (7th Cir. 1984) (parents obligated to pay tuition to out-of-state school for disabled children based on oral statements, but parents not required to pay amount reflected by retroactive tuition increase where parents had no notice of the increase).

[453] See Princeton Montessori Soc'y v. Leff, 591 A.2d 685, 687 (N.J. Super. Ct. 1991) ("where the contract expressly provides that no deduction or refund will be made, the entire tuition is payable despite the fact that the student withdraws from the school . . . [and] [i]n these circumstances, the educational institution has no duty to mitigate damages.").

parties. In *Perez v. Aerospace Academy, Inc.*,[454] a parent, whose child had been expelled from the academy after two months, sued for a partial refund of tuition, room, and board charges. The academy counter-claimed for the unpaid balance of the contract. While upholding the position that a private school is entitled to the full amount of tuition, room, and board if a child is expelled, the court ruled that a liquidated damages clause in the contract is unenforceable as a penalty to the extent that it fails to allow out-of-pocket savings by the Academy on board charges. If the board charge could be determined, the parent was entitled under Florida law to a credit for the school's savings on food as a result of his daughter not attending the school.

On the other hand, in *Marquez v. University of Washington*,[455] a student claimed that a special program providing "academic aid . . . for students of minority ethnic groups"[456] as advertised in the AALS pre-law handbook prohibited the university from replacing a formal tutoring program for a voluntary assistance program after the student's first year of law school. In response to the student's claim that a handbook provision could not be changed, the court observed that, "the concept of a binding, absolute, unchangeable contract is particularly anomalous in the context of postgraduate work."[457] Occasionally contracts will incorporate documentation external to institutions, such as is the case in the *AAUP's Principles of Academic Freedom and Tenure*, but courts will not normally find that such documents confer contractual rights.[458] A faculty member may attempt to invoke custom and usage to demonstrate that contracts in a particular area are normally for a period of time longer than the employee served, but such efforts require more than comparison to other institutions.[459] Students may seek recovery under state consumer protection statutes, but recovery will be denied if the student does not satisfy the terms of the statute.[460] Likewise,

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[454] 546 So. 2d 1139 (Fla. Dist. Ct. App. 1989).

[455] 648 P.2d 94 (Wash. Ct. App. 1982).

[456] *Id.* at 96.

[457] *Id.* at 97.

[458] Waring v. Fordham Univ., 640 F. Supp. 42 (S.D.N.Y. 1986) (AAUP position against tenure quotas cannot form basis of contract claim); Hill v. Talladega College, 502 So. 2d 735, 739 (Ala. 1987) (AAUP guideline that "probationary period should not exceed seven years" did not confer tenure on plaintiff who had taught at College for 10 years); Krasek v. Duquesne Univ., 437 A.2d 1257 (Pa. Super. Ct. 1981) (employment standards determined by faculty handbook, not ABA and AALS standards).

[459] Roberts v. Wake Forest Univ., 286 S.E.2d 120 (N.C. Ct. App. 1982) (golf coach discharged at end of 16 months unsuccessful in custom and usage claim of longer contract based on contracts for golf coaches at other institutions because in North Carolina contracts of indefinite duration are employment-at-will). *Contra* Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (employment practices can change at-will contract into implied contract).

[460] See Finstad v. Washburn Univ. of Topeka, 845 P.2d 685 (Kan. 1993) (even though university's statement that its court reporting program was approved when it was not was a *per se* violation of the state's Consumer Protection Act, plaintiffs of the program were not "aggrieved" within

students who allege that they have been misled after they complete an academic program and are then ineligible to take a licensing examination in another state, will be unsuccessful in their claim where the university has advised students that regulations for licensing examinations vary from state to state and that students should seek information directly from the licensing state.[161]

A distillation of the law reflected by the cases discussed suggests that contractual language can become susceptible to misrepresentation or breach of contract claims when:

(1) The alleged changes or inaccuracies deal with curricular or tenure matters;

(2) The student or employee has specifically relied upon the changes or inaccuracies as demonstrated by prior inquiry regarding the item at issue;

(3) The changes in or inaccuracies concerning a curricular program affect the substance or completion of a professional or vocational program so that the student's livelihood is negatively impacted;

(4) The changes or inaccuracies are so substantial as to not be reasonably reflected in a typical handbook statement permitting alteration, amendment, or abolition of rules or regulations at any time.[162]

The third major problem area of contractual constraints concerns the good faith or fairness of contract enforcement. Good faith can be intimated from the actions of the parties as well as from verbal comments.[163] Generally, a covenant of good faith and fair dealing is implied in every con-

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the terms of the statute because there was no causal connection between the university's statement and the high percentage of the university's graduates who failed the state's licensing exam.)

[161] Abraham v. New York Univ. Sch. of Dentistry, 393 N.Y.S.2d 229 (N.Y. App. Div. 1977).

[162] *See* Peretti v. Montana, 464 F. Supp. 787 (D. Mont. 1979) ("an educational institution . . . is a living changing thing [and cannot] reasonably be expected to remain static . . . ." However, damages awarded for cancellation of a six unit course in aviation without giving students enrolled in the program an opportunity to complete it); Eden v. SUNY, 371 N.Y.S.2d 686 (N.Y. App. Div. 1975) (state budget office decision to postpone opening of new program in podiatric medicine after students had been admitted and had foregone opportunities to enroll elsewhere resulted in court order to open program); Behrend v. State, 379 N.E.2d 617 (Ohio Ct. App. 1977) (university decision not to pursue accreditation of its School of Architecture after statements had been made to that effect to students by faculty and administrators resulted in award of monetary damages).

[163] *See* McGhee v. Miller, 837 S.W.2d 596 (Tenn. 1992) (in a bizarre case that has gone three times to the Tennessee Supreme Court, a teacher who had failed a basketball player and was dismissed by school board was ordered reinstated with backpay and forward pay for lack of fairness following threats to teacher by athletic department, a shot fired through her windshield, and sale of buttons at school expressing desire she had been shot).

tract. However, this covenant cannot be used to obliterate express contract language. For example, in *Tollefson v. Roman Catholic Bishop of San Diego*,[364] an administrator, whose one-year contract was nonrenewed prior to the date provided in the contract, was not entitled to have superimposed on the contract an "objective standard" requiring "objective and justifiable cause" before the contract could be nonrenewed.[365] Where contract nonrenewal occurred not "by an act inconsistent with the terms of the contract but rather by the expiration of the agreed contract term," the covenant of good faith and fair dealing cannot be used "to rewrite a contract to include provisions entirely foreign to and expressly negated by the original."[366] This principle was pressed even further in *Willitts v. Roman Catholic Archbishop of Boston*[367] where a court refused to agree with a nonrenewed teacher's claim that her one-year contract should have been automatically renewed. The school allowed her contract to expire at the end of the year without providing the notification suggested in the faculty handbook.[368]

Educational institutions will normally have broad discretion in interpreting rules, policies, or handbooks, especially where academic standards are concerned, without being considered to have exercised bad faith. The classic statement was made in *Shields v. The School of Law, Hofstra University*[369] where a student's breach of contract against the law school for continuing to calculate a failing grade in her GPA was dismissed by the court. The student attempted to argue that her reliance upon an assistant dean's statement that, if she rewrote a brief and received a higher grade, her failing grade would not be counted in her GPA, caused her not to appeal the failing grade. The plaintiff did in fact receive a passing grade on the second brief but, "consistent with its academic regulations as set forth in its bulletin, the school continued to count plaintiff's failing grade . . . ."[370] In dismissing the student's complaint, the court made a fairly typical and representative statement concerning the academic relationship between an institution and its students (or faculty).

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[364] 268 Cal. Rptr. 350 (Cal. Ct. App. 1990).
[365] *Id.* at 355.
[366] *Id.* at 356.
[367] 381 N.E.2d 475 (Mass. 1991).
[368] The nonrenewal language in the faculty handbook was considered by the court to be advisory rather than mandatory. "The teachers *should* be formally notified of a decision prior to April 15, so that opportunities to seek other employment will not be lost." *Id.* at 478 (emphasis added).
[369] 431 N.Y.S.2d 60 (N.Y. Sup. Ct. 1980).
[370] *Id.* at 61.

> In the absence of any allegations of such a provision, there is no basis to conclude that the law school's decision with respect to those matters involved anything other than the exercise of sound academic discretion, unfettered by contract and unreviewable by courts.[471]

Similarly, in *Napolitano v. Princeton University*,[472] a court upheld one year's delay in awarding a baccalaureate degree to a student who had plagiarized a paper. Even though the judge was troubled by the severity of the penalty and even though in twenty or more disciplinary cases no student had been penalized as severely, the court observed that such a comparison "is totally irrelevant because each penalty obviously must be viewed with regard to the offender and the community."[473] In the recent case of *Susan M. v. New York Law School*,[474] a law student who had been dismissed from the law school because of a failing grade was denied a trial on the issue of the fairness of the faculty member's grading. In upholding the student's dismissal, the court observed that:

> As a general rule, judicial review of grading disputes would involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions.[475]

In a case involving a religious educational institution, *Bischoff v. Brothers of the Sacred Heart*,[476] a court upheld cancellation of a contract for a new religion teacher prior to the beginning of the year. On his employment application under the category "Religion," the applicant had checked off "Practicing Catholic: Yes" and under "Marital Status" had noted "married." Even though the subject of marriage and divorce had not been discussed during

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[471] *Id.* at 63. The effect of oral statements upon institutional policies is problematic and courts are not consistent on their treatment of such statements. *Compare* Healy v. Larsson, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971) (oral representatives made to students during "consultation with dean, director of admissions, acting president, a guidance counselor and chairman of a department of the community college" created obligation to award a degree) *with* Olsson v. Board of Higher Educ., 492 N.E.2d 1150 (N.Y. 1986) ("representation" or "information given" by faculty member regarding number of comprehensive examinations to receive passing grade was merely professor's "unfortunate slip-of-the-tongue" and was not binding on the college.)

[472] 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

[473] *Id.* at 278. For a discussion of *Napolitano*, see R. MAWDSLEY, ACADEMIC MISCONDUCT: PLAGIARISM AND CHEATING (NOLPE 1984). The leading case on institutional discretion in academic penalties is Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

[474] 556 N.E.2d 1104 (N.Y. 1989).

[475] *Id.* at 1107.

[476] 416 So.2d 348 (La. Ct. App. 1982).

the interview, the school subsequently learned that the applicant had a prior marriage and divorce and had canceled his contract because divorced persons were not permitted to teach religion. In deciding this case for the school, the court relied upon the applicant's background of six years in a Catholic Seminary and his assertion at trial that "he didn't divulge his marital history because he knew Brother Farrel would not have hired him under these circumstances."[477] As a further note, the United States Supreme Court has given greater protection to religious institutions under Title VII in enforcing religious standards on employees, even if the standards are enforced after the employee was hired and even if the employee is not performing a religious function.[478]

However, institutions do not have unfettered discretion in arbitrarily or capriciously enforcing contracts. In *Blank v. Board of Higher Education of City of New York*,[479] a court ordered Brooklyn College to confer a baccalaureate degree upon a student. This rather extraordinary judicial remedy was prompted because the college had refused to transfer credits for work done at another institution. The college had arbitrarily attempted to rely upon a newly added provision in the school catalog for the year following the one in which the student should have graduated and to rely upon only one part of the catalog when other portions of the catalog made differing statements.[480] In *Heisler v. New York Medical College*,[481] a court overturned a dismissal of a student who had failed four courses during her first year when three other students, some with more failures and weaker excuses, were not. In ordering reinstatement, the court observed that,

> when a school deviates from its rules and makes exceptions thereto, it must employ some understandable, unified standards. The failure to establish and maintain such standards constitutes an impermissible abuse of discretion and a lack of good faith on the part of the educational institution.

Enforcement of a rule may be arbitrary not because of contract interpretation but because a contract provision is superseded by public policy. Frequently, nonpublic schools will attempt to collect past due obligations by

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[477] *Id.* at 331.

[478] Amos v. Corporation of Presiding Bishop, 107 S. Ct. 2862 (1987) (employee was janitor in a church-owned gymnasium that was open to the public). For an analysis of *Amos* see R. Mawdsley, *Religious Universities and Title VII: The Right To Discriminate on Religious Grounds*, 43 EDUC. L. REP. 1143 (1988).

[479] 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966).

[480] Similarly, new catalog provisions cannot be applied retroactively if the catalog under which a student entered made promises that certain catalog provisions would not be subject to change. University of Tex. Health Science Ctr. at Houston v. Babb, 646 S.W.2d 302 (Tex. Ct. App. 1982).

[481] 449 N.Y.S.2d 834 (N.Y. Sup. Ct. 1982).

denying readmission to students or by refusing to send official transcripts.[482] However, in *In re Parkman*,[483] a private college could not discontinue a student for refusal to accelerate a past due account after the student had arranged a Chapter Thirteen debtor's plan.[484] Although normally state action is required before an institution is affected by nonretaliation protection under a debtor's plan, the court observed that "where the actions of a private institution such as withholding a transcript are really tools to collect a discharged debt or a debt provided for under a plan, debtors are denied the fresh start contemplated by Congress enacting the Bankruptcy Code."[485]

Since contract is the basis for defining institution-student relationships, special contractual concepts such as substantial performance can come into play. In *Russell v. Salve Regina College*,[486] an overweight student in a nursing program who had signed an agreement to enroll in a weight loss program and lose two pounds per week had substantially performed the contract by enrolling in the program even though she did not lose the weight. As a result of being illegally dismissed from the nursing program for failing to lose weight, the student was awarded $49,903.45.

Courts have not been willing to go beyond contractual rights to permit disgruntled parents or students to sue nonpublic or public schools for educational malpractice. The policy reasons for not recognizing a cause of action for educational malpractice can be summarized as follows: "(1) a lack of a measurable standard of care; (2) inherent uncertainties as to the cause and nature of damages; (3) the potential for a flood of litigation; and (4) the courts' overseeing the day-to-day operation of the schools."[487] The classic, and frequently quoted, rationale for not recognizing educational malpractice as a cause of action was stated in *Ross v. Creighton University*:[488]

> Education is an intensely collaborative process, requiring the interaction of student with teacher. A good student can learn from a poor teacher; a poor student can close his mind to a good teacher. Without effort by a student, he cannot be educated. Good teaching methods may vary with the needs of the individual student. In other professions, by contrast, client cooperation

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[482] Under the Family Educational Rights and Privacy Act (FERPA) a student in an institution receiving federal assistance must be permitted access to his education records. Where the student is beyond a reasonable distance (FERPA office suggests 50 miles) from the institution, he will have been considered to have been denied access to his records if the institution refuses to mail him a transcript. However, the transcript can be stamped "Issued to student." *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(d).

[483] 27 B.R. 460 (Bkrtcy. N.D. Ill. 1983).

[484] 11 U.S.C. §§ 362(a), (b); 1301.

[485] *Parkman*, 27 B.R. at 462.

[486] 938 F.2d 315 (1st Cir. 1991).

[487] Finstad v. Washburn Univ. of Topeka, 845 P.2d 685, 694 (Kan. 1993) (Wachtler, J. concurring).

[488] 740 F. Supp. 1319 (N.D. Ill. 1990) (student who had been recruited by the university to play

> is far less important; given a modicum of cooperation, a competent professional in other fields can control the results obtained. But in education, the ultimate responsibility for success remains always with the student. Both the process and the result are subjective, and proof or disproof extremely difficult.[489]

Unless supported by contractual language,[490] courts have been unwilling to entertain causes of action based on "quality of education,"[491] particularly if the court's task in assessing quality is to interpret whether the education provided is consistent with denominational religious tenets.[492]

However, courts have pointed out that: "[i]f . . . a nonpublic school were simply to accept a student's tuition and thereafter provide no educational services, an action for breach of contract might lie. Similarly if the contract with the school were to provide for certain specified services, such as for example, a designated number of hours of instruction, and the school failed to meet its obligation, then a contract with appropriate consequential damages might be viable."[493] Thus, even if a school promised that "a student would reach a certain proficiency after pursuing certain studies,"[494] the cause of action is still contractual and not educational malpractice.

Special Contractual Problems

Two problems which nonpublic schools most likely have dealt with, or will deal with, are communicable diseases (particularly AIDS) and pregnant students. While there is no question that schools generally have a statutory duty to protect the health of students, primarily through vaccination requirements,[495] the school's function becomes somewhat ambiguous where

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basketball and completed eligibility without accumulating sufficient credits to graduate had no cause of action in educational malpractice but did state a cause of action for breach of contract in that the university failed to provide promised remedial help.)

[489] *Id.* at 691.

[490] *See* Squires v. Cambridge Sch., 523 P.2d 256 (Nev. 1991) (breach of contract and misrepresentation causes of action permitted when a student's learning disabilities not remediated as promised); Village Community Sch. v. Adler, 478 N.Y.S.2d 546 (N.Y. Civ. Ct. 1984) (breach of contract and fraud complaint upheld for school's failure to detect learning deficiencies).

[491] In nonpublic education, *see* Houston v. Mile High Adventist Academy, 846 F. Supp. 1449 (D. Colo. 1994); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (N.Y. Sup. Ct. 1982); Pietro v. St. Joseph's Sch., 48 U.S.L.W. 2229 (N.Y. Sup. Ct. 1979). In public education *see* Tubell v. Dade County Pub. Sch., 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Hunter v. Board of Educ. of Montgomery County, 439 A.2d 582 (Md. 1982); D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981).

[492] *Houston*, *supra* note 491 (no neutral principles of law or final determination of highest ecclesiastical authority to form basis of resolving dispute).

[493] *Paladino*, *supra* note 491 at 873.

[494] *Pietro*, *supra* note 491 at 55.

[495] *See generally* S. Thomas, Health Related Legal Issues In Education 10-15 (NOLPE 1987).

no vaccine exists for the disease. The AIDS crisis has been difficult for religious nonpublic schools to address because many of those infected with HTLV-3 virus may reflect lifestyles antithetical to religious beliefs of some of the schools regarding sexuality (e.g., religious views may include judgments concerning homosexuality, bisexuality, heterosexual promiscuity, and intravenous drug use). However, a significant number of AIDS carriers have contracted the disease through contacts other than sexual, especially through blood transfusions.

In the public schools, students infected with the AIDS virus have been protected from automatic exclusion from the public school classroom under the Individuals with Disabilities Education Act (IDEA),[486] the Rehabilitation Act,[487] and the Americans with Disabilities Act (ADA).[488] The ADA reflects the United States Supreme Court decision in *Arline* under the Rehabilitation Act that communicable diseases are disabilities and that a public school district had to make a "reasonable accommodation" for a teacher with tuberculosis who was "otherwise qualified."[489] However, the ADA applies to nonpublic educational institutions and thus the body of law that has developed under the Rehabilitation Act will now be largely extended to nonpublic schools. But the ADA applies only to discrimination against employees in religious nonpublic schools, while students in such schools have no ADA protection. In nonsectarian nonpublic schools, the ADA applies to both employees and students.

Legal responsibility for nonpublic schools comes from several directions. First, even though the IDEA applies directly only to public schools, the Rehabilitation Act only to recipients of federal assistance, and the ADA only partially to nonpublic schools, these schools in general may be subject to state or local anti-discrimination provisions. Although religious schools may contemplate a free exercise religious exemption, it is difficult to construct an argument that a disease like AIDS is a moral wrong. In order to make this argument, an institution would have to be prepared to declare that a student or employee who acquired AIDS through means without any connotation of moral culpability, such as a blood transfusion, has become a moral leper, an improbable leap in religious belief. Second, with the enactment of the ADA, the possibility exists that nondiscrimination against those with disabilities may become another established public policy and, if such were to happen,

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[486] *In re* Ryan White, 507 EHLR 239 (home-bound program not "least restrictive environment").

[487] District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (person with AIDS is physically impaired).

[488] 29 U.S.C. § 706; 42 U.S.C. § 12101 *et seq.*

[489] See School Bd. of Nassau County, Fla. v. Arline, 107 S. Ct. 1123 (1987) *on remand*, 692 F. Supp. 1286 (M.D. Fla. 1988) (teacher subject to relapses of tuberculosis was "otherwise qualified" and had to be accommodated under Rehabilitation Act).

educational institutions could face loss of institutional tax exemption.[500] Third, regardless of responsibility under the various statutes, nonpublic institutions may be subject to breach of privacy lawsuits if employee or student removal results in the unauthorized release of confidential information.[501] A preferable approach to the AIDS crisis would seem to be a deliberate policy that considers each AIDS carrier on an individual basis.[502]

A second major problem area concerns the handling of pregnant students. In the public sector, pregnant students are protected from exclusion from an education under Title IX of the Education Amendments of 1972,[503] the Fourteenth Amendment's equal protection clause, or under various state statutes.[504] These provisions will not apply to most nonpublic schools which are then free to determine their own policy.

For those nonpublic schools that automatically exclude pregnant students, the following legal concerns may be of interest. First, school policies cannot be enforced in an arbitrary and capricious manner. Dismissal of a pregnant girl, but not the boy who admitted paternity, would certainly raise that issue. Second, any effort to expand public school standards to religious schools would normally be met with a free exercise defense. However, a moral principle opposing premarital sex which is invoked in every situation to exclude a pregnant student would seem to be opposing the pregnancy rather than the premarital sex. Presumably, a student who engaged in premarital sex but did not become pregnant would be treated the same way as one who did become pregnant. Treating the presence in school of a pregnant girl as an endorsement of premarital sex depends upon considering pregnancy as equally reprehensible as premarital sex. Those institutions which take a strong right-to-life position in the abortion conflict may want to consider whether it is consistent to fight strenuously to protect the fetus and prevent termination of pregnancies but then punish the fetus carrier. Third, the creation of an established public policy to eradicate gender discrimination would bring under scrutiny any school policies disciplining all pregnant students, on the theory that only females would be affected.[505]

In view of the above discussion, nonpublic schools may want to consider whether exclusion of pregnant students is consistent with their mission and ministry. Schools may want to at least consider alternative educational opportunities, such as homebound education.

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[500] See *infra*, section on *Government and Fundamental Public Policy* in chapter on "Governmental Regulation of Nonpublic Schools."

[501] See R. Mawdsley, *Privacy Rights of AIDS Victims*, 31 EDUC. L. REP. 697 (1986); E. Hartog-Rapp, *AIDS Poses Legal Risks for School Boards*, 40 EDUC. L. REP. 112 (1987).

[502] For an example of such a policy see the one prepared by William Ball in R. MAWDSLEY AND A. FORTOSIS, WHAT EVERY CHRISTIAN SCHOOL SHOULD KNOW ABOUT THE LAW (ACSI 1989).

[503] 20 U.S.C. § 1681 (applicable to institutions receiving federal assistance).

[504] See Thomas, *supra* note 495 at 66-72.

[505] For a fuller treatment of these three legal concerns see *supra* book cited in note 502.

Recommendations

In summarizing this chapter on constitutional and contractual considerations regarding institutional relationships, the following recommendations may be of assistance.

(1) Parties to an employment contract would do well to discuss general or ambiguous terms, e.g. "other assigned duties," prior to signing. Any special arrangements, such as exclusion from certain duties, need to be committed to writing.

(2) Special service obligations or conduct standards need to be clearly spelled out in faculty, staff, or student handbooks. If faculty or staff handbooks are to be part of the contract, then incorporate them by reference in the employment contract signed by the employee. Administrative desire to maintain freedom to modify the handbooks at any time may need to be balanced with possible negative effects on employee/student morale when rights/benefits can be altered or deleted at an employer's discretion.

(3) Employment-at-will contracts should include a disclaimer statement expressly stating that the employment relationship is "at-will."[58]

(4) Handbooks should state the institution's discipline policy, including punishable offenses, kinds of punishments, and the discipline procedure.

(5) Institutional materials need to be reviewed annually so that conflicts or contradictions among policies are eliminated. This review should include not only handbooks but also promotional materials.

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[58] For a sample, see J. Shepard, H. Olsen and R. Dustin, Employment At Will: A Guide to an Eroding Doctrine 8 (CUPA 1987).

CHAPTER III

GOVERNING BOARD RESPONSIBILITIES AND LIABILITY

Introduction

The personal liability of members of governing boards of nonpublic educational institutions has generated relatively little litigation or literature when compared with that generated by the public sector.[307] This relative absence of case law or commentary can probably be attributed to a number of factors: less likelihood by clientele to sue nonpublic schools; the much-diminished role of nonpublic school boards in actual governance; and the greater visibility of administrators as the actual source of policy and day-to-day decision making. Nonpublic elementary and secondary schools, especially those with religious affiliations, tend to be hierarchal in administrative structure and operation. Governing boards of post-secondary institutions frequently have more authority in school decisions, but the geographical separation of board members often makes board meetings that do not occur annually or semi-annually difficult for some members to attend. It is not uncommon for post-secondary boards to delegate more frequent governance decisions to executive committees composed of board members who are able to meet at more frequent intervals. Although executive committees are predominantly composed of line administrators, often there are also several board members who are not administrators.

The trend among educational institutions with endowments is to hire professional money managers to manage endowments, but the governing board has a duty oversee the money managers. In *Bache Halsey Stuart v. University of Houston*,[308] the university's board of regents sought unsuccess-

[307] In Wood v. Strickland, 420 U.S. 308, 322 (1975) the United States Supreme court decided that a public school board member could be individually liable under section 1983 of the Civil Rights Act according to "a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." *See Wood v. Strickland: Liability of School Board Members for Damages Resulting from a Deprivation of a Student's Civil Rights*, 13 CAL. W. L. REV. 153 (1976-77); R. Stern, *Wood v. Strickland: The Aftermath*, 8 URBAN LAW 885 (1976). The absence of sufficient involvement between a nonpublic educational institution and a state immunizes nonpublic schools from section 1983. Rice v. President and Fellows of Harvard College, 663 F.2d 336, *cert. denied*, 456 U.S. 928 (1982). However, private schools can be as equally unsusceptible to mandamus actions as public institutions. Carr v. St. John's Univ., 198 N.E.2d 18 (N.Y. 1962); Harris v. Trustees of Columbia Univ., 470 N.Y.S.2d 368 (N.Y. App. Div. 1983).

[308] 638 S.W.2d 920 (Tex. Ct. App. 1982).

fully to keep from reimbursing a brokerage firm for a half-million dollars in losses when the firm liquidated securities at the direction of the university. The university's claim, rejected by the court, was that the university employee dealing with the firm was not authorized to permit buying and selling of securities. In essence, the court recognized that the board of regents of this university could delegate the management of investment funds, but the board was required to retain control over the investment program and to review the status of investments. Since *Bache Halsey Stuart* was decided on the basis of contract law, the principle in this case would seem to apply equally to nonpublic educational institutions.

The relative infrequency of lawsuits against nonpublic universities notwithstanding, the *Bache Halsey Stuart* decision suggests that board members in all educational institutions should not permit themselves to be anesthetized concerning their legal responsibilities. The minimum responsibilities for board members are:

(1) To attend meetings of the board and committees;

(2) to examine financial statements of the institutions;

(3) to acquire working knowledge of institutional policies;

(4) to make inquiries;

(5) to discharge responsibilities in a reasonable, prudent and informed manner.[508]

Ascending Liability

Governing boards of nonprofit organizations may be responsible for the action of other organized and separately incorporated units which can be viewed as part of a hierarchical unit.[509] Structural separation frequently sought successfully among for-profit corporations to separate legal entities and yet to remain in control is not as successful among nonprofit corporations. Existing judicial attitudes make structural separation an unreliable device to use in separating legal responsibilities, partly because of the differences between members of nonprofit corporations and stockholders of for-profit corporations, and partly because a similarity in a common enterprise or mission among several related nonprofit (especially religious) entities tends to be viewed as a principal-agent relationship.[510]

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[508] LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES (K. Weeks, ed. 1982) at III-7. *See also*, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, TRUSTEE RESPONSIBILITY FOR ACADEMIC AFFAIRS (1984); Dominguez, *To Resign or To Rule: A Choice For University Boards of Trustees*, 3 CONN. L. REV. 375 (1971).

[509] For a definitive work on this subject see, E. GAFFNEY, JR. AND P. SORENSON, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (1984).

[510] *Id.* at 75-82. P. Moots, Ascending Liability, PLANNING MEMORANDUM 5-6 (1987).

In *Barr v. United Methodist Church*,[512] the church, an unincorporated association, was held financially responsible following the bankruptcy of a California nonprofit corporation which operated fourteen retirement homes. When the corporation, which had contracted to furnish convalescent care, accommodations, and food service in exchange for full pre-payments or monthly payments was unable to meet its commitments, the residents sued the Methodist denomination. Brushing aside first amendment religious issues,[513] the court determined that the church denomination should be responsible for denominational subunits which "share a common purpose" and "function under a common name."[514] In hierarchical organizations where the various subunits function as a corporate organization, board members and officers of the parent denomination who enjoy "the benefits, both economic and spiritual of [the subunit's] projects"[515] and who oversee a system that "does not provide any method of redress for . . . [a] class of plaintiffs who have alleged fraud, breach of contract and statutory violations,"[516] can be required to respond to plaintiff's claims.

The lesson from *Barr* would seem to be that church board members and officers may not be immune from liabilities in a church's educational institutions. Immunity may not even be desirable because the governance in a separate subunit (the school) necessary to achieve that immunity may well be incompatible with the church's religious tenets or inconsistent with the church's goal of religious homogeneity in all units of the organization.

Fiduciary Relationship

Board membership is a fiduciary relationship and any business dealings between a board member and his or her institution will be examined with the greatest scrutiny. The allegations from plaintiff's complaint in *Gilbert v. McLeod Infirmary*[517] illustrate the type of dealings between a board member and his or her institution which can result in such dealings being rendered void by the institution's officers, minor board members, and even employees. In Gilbert, the actions which resulted in a sale of institutional property to a board member being set aside were:

(1) Attendance and activity of the purchasing board member at the meeting where the transaction was considered;

(2) profit to the board member and potential or actual present or future loss to the institution;

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[512] 153 Cal. Rptr. 322 (Cal. Ct. App. 1979).
[513] *Id.* at 332-33.
[514] *Id.* at 328.
[515] *Id.* at 331.
[516] *Id.* at 333.
[517] 64 S.E.2d 524 (S.C. 1951).

(3) consideration of less than two-thirds of the fair market value;

(4) authorization of the transaction at an irregular board meeting with ratification at a subsequent board meeting advocated by the purchasing board member;

(5) failure to satisfy the notice requirement imposed by the corporation's constitution.[518]

Even though the *Gilbert* court found no "actual fraud or fraudulent intent,"[519] the court set aside the board member's purchase because "his conduct failed to measure up to the high standard required by the law of one in his fiduciary relation . . . ."[520] Although a board member is not prevented from dealing with his own nonprofit institution, he bears the burden of proof that he made full disclosure regarding his purchase, paid full value, and imposed no burden upon the institution. The *Gilbert* court concluded that the doctrine is firmly established that "a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts."[521]

Business Dealings with Institutions

The responsibility of board members to exhibit fair dealing and loyalty in transactions with their nonpublic institutions was very well stated in the case of *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*.[522] Because *Stern* represents the all-too-common situation in nonprofit institutions where there is a dominant administration and relatively passive board members, the facts, as well as the law of this case, are especially important. In *Stern*, a hospital board of 25 to 35 members was required by their bylaws to meet at least twice a year; between meetings the board was to be represented by an executive committee. In addition, the board created a finance committee to review the budget and report on cash available for investment. However, for approximately twenty-years, the board and its committees were dominated by two trustee officers, the hospital administrator and the treasurer. Not until the deaths of both men did the other trustees appear to have assumed an identifiable supervisory role over

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[518] *Id.* at 527, 531.
[519] *Id.* at 531.
[520] *Id.*
[521] *Id.* at 530. *See also In re* Beychok, 495 So. 2d 1278 (La. 1986) (setting aside board contract for advertisement space where contract was on behalf of company owned by a board member); Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988) (declaring null and void teaching contracts entered into between school board and spouses of board members under state statute prohibiting public officers from having any direct interest in a contract).
[522] 381 F. Supp. 1003 (D.S.C. 1974).

investment policy and general hospital fiscal management.

Plaintiffs in *Stern* were patients who brought a class action challenging various aspects of the hospital's fiscal management. They alleged two causes of action: (1) hospital board members who were also board members of banks or investment firms conspired to enrich themselves and their financial institutions by favoring those institutions in financial dealing with the hospital; (2) hospital board members breached their fiduciary duties of care and loyalty in the management of hospital funds.

Plaintiffs sought to substantiate their claims with the following facts:

(1) the hospital maintained much of its liquid assets in savings and checking accounts rather than in treasury bonds or investment securities;

(2) most investment funds were deposited in the financial institutions with which the hospital board members were involved;

(3) a yearly audit was prepared for the board members, but they rarely if ever read the details and approved the treasurer's investment recommendations as a matter of course;

(4) none of the board members attempted to force their views upon the treasurer who considered their suggestions as interference;

(5) renegotiation of a mortgage with board members' financial institutions;

(6) signing an investment advisory agreement with one of the board member's investment firms.

The court found no evidence to support plaintiff's conspiracy claim. Although, as the court observed, "defendants were able to offer no adequate justification for utilization of the hospital's assets,"[32] there was no evidence of board members' directions or encouragement of the treasurer's favoritism for defendant's financial institutions; there was no evidence that mortgage terms or investment fees were unreasonable; there was no evidence that the financial institutions had any contact among themselves relating to the handling of the hospital's business; and there was no evidence that any of the board members solicited business for his own financial institution.

Standard of Care

The general rule for standard of care seems to be that governing boards of religious institutions will be held to corporate rather than charitable trust

[32] *Id.* at 1010.

principles. In *Corporation of Mercer University v. Smith*,[524] the Georgia Supreme Court determined that decisions by the Tift College Board of Directors, flowing from the merger of two institutions affiliated with the Georgia Baptist Convention, Tift College and Mercer University, were to be decided by corporate principles. Because of Tift College's declining enrollment, this women's college entered into a merger agreement with Mercer in 1986, with Mercer agreeing to "make a good faith effort to operate Tift College of Mercer University on Tift's present Forsyth, Georgia campus,[but to hold as paramount] the preservation of an entity bearing the Tift name for the education of women in a Christian context. . . ."[525] When the Mercer University Board of Directors voted in 1986 to close the Tift campus, the Tift College plaintiffs sought to vacate the merger on the ground that the Tift Board of Directors had failed to exercise a standard of care compatible with trust principles. In upholding the merger, the state supreme court found on behalf of the Tift Board of Directors.

> The formalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses. These institutions hold a variety of assets, and those persons responsible for the operation of the institutions need the administrative flexibility to make the many day-to-day decisions affecting the operation of the institutions, including those decisions involving the acquisition and sale of assets.[526]

Moreover, in *Stern v. Lucy Webb Hays National Training School for Deaconesses and Missionaries*,[527] the court, in responding to plaintiff's breach of duty claims of mismanagement and self-dealing, made a more detailed analysis as to what the legal standard of care ought to be for board members. The court distinguished between trustees who manage charitable trusts and directors who manage charitable corporations.[528]

> Both trustees and corporate directors are liable for losses occasioned by their negligent mismanagement of investments. However, the degree of care required appears to differ in many jurisdictions. A trustee is uniformly held to a high standard of care and will be held liable for simple negligence,[529] while a

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524. 371 S.E.2d 858 (Ga. 1988).
525. *Id.* at 860.
526. *Id.* at 860-61.
527. *Supra*, note 522.
528. For a discussion of the difference between charitable trusts and corporations see G.G. Bogart and G.T. Bogart, Handbook of the Law of Trusts (5th ed. 1973) at 245-46. See *also* Corcoran v. Rockewell, 410 A.2d 202, 205 (D.C. Cir. 1979).
529. Attempts by the settlor to reduce the amount of skill and prudence required of the trustee through appropriate exculpatory language often meets with judicial hostility. See Bogart, *supra* note 528 at 330-343.

> director must often have committed 'gross negligence' or otherwise be guilty of more than mere mistakes of judgment.[530]

Where funds are managed by a charitable corporation or where funds are left to a charitable corporation, "by the better view, no trust in the strict sense is created."[531]

But even if nonprofit institution board members are "held to the less stringent corporate standard of care" and "are required to exercise ordinary and reasonable care in the performance of their duties, exhibiting honesty and good faith,"[532] the court in *Stern* made the following statements of law regarding the responsibilities of corporate board members:

> (1) Corporate board members can delegate investment decisions to committees "so long as all directors assume the responsibility for supervising such committees by periodically scrutinizing their work";[533]
>
> (2) a corporate board member who fails to supervise or even attend board meeting "has violated his fiduciary duty to the corporation."[534]
>
> (3) while a corporate board member may rely upon the expertise of corporate officers, such reliance is no excuse for dispensing with or ignoring officer reports;
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> (4) a corporate board member who permits negligent mismanagement by others to go unchecked "has committed an independent wrong against the corporation; he is not merely an accessory under an attenuated theory of *respondeat superior* or constructive notice."[535]
>
> (5) a corporate board member "should not only disclose his interlocking responsibilities but also refrain from voting on or otherwise influencing a corporate decision to transact business with a company in which he has a significant interest or control."[536]

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[530] See Stern, *supra*, note 522 at 1013.

[531] Midatlantic Nat'l Bank v. Frank G. Thompson Found., 405 A.2d 866 (Pa. Super. Ct. 1979); Lefkowitz v. Cornell Univ., 271 N.E.2d 552 (N.Y. 1971) (gift of wind tunnel to Cornell was a corporate asset rather than trust, and therefore university could sell asset if it chose). See *generally* J. Beach, The Management and Governance of Academic Institutions, 12 J.C.U.L. 301, 320-21 (1985).

[532] Stern, *supra* note 522 at 1013.

[533] *Id.*

[534] *Id.* at 1014.

[535] For a thorough discussion of corporate board member or director liability for acts of a co-director or officer see W. Fletcher, Cyclopedia of the Law of Private Corporations § 1065 (1975).

[536] See Stern, *supra* note 522 at 1014; *supra* notes 521 and 518. See *also* W. Poth, *Personal Liability of Trustees of Educational Institutions*, 1 J.C.U.L. 84, 87 (1973).

Although the court in Stern dismissed the complaint against defendant financial institutions, rejected all claims of conspiracy, and refused to cancel the disputed mortgage, the court found the defendant board members to have breached their duties of care and loyalty to the hospital and ordered the board to enact and implement certain policies to prevent future conflicts.[537]

Areas of Vicarious Liability

Board members have occasionally been found personally liable in cases other than financial dealings. In *Gamble v. Vanderbilt University*,[538] members of the executive committee of a private university charged with supervision of an office building owned and operated by the university were liable to a person injured in the fall of an elevator in the building for their misfeasance in permitting the elevator to be operated when they knew it was unsafe. In *Love v. Nashville Agricultural and Normal Institute*,[539] the manager of a private normal school which committed a nuisance by polluting an adjoining landowner's water supply was held personally liable even though he did not purposely commit the wrong and merely acted as an agent of the school. In *Jones v. Jones*,[540] the owner and director of a day care facility was found personally and solely liable when one of her employees left on the serving tray a container of hot food which spilled on two-year-old plaintiff, despite defendant's explicit instruction to her employees that to leave food on a serving tray would be in violation of the rules. Occasionally board members of educational institutions have been sued where they have refused to ratify or have altered employment contracts negotiated by the school's administrator. Such lawsuits are generally unsuccessful because persons negotiating employment arrangements with a school administrator are presumed to know that such arrangements are not final until approved by the governing board.[541]

Governing boards of churches increasingly have been sued by disciplined church members for invasion of privacy or intentional infliction of emotional distress.[542] Although technically not vicarious board liability because the board members themselves were responsible for the discipline, these law-

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[537] An enumerated summary of the courts declaratory order can be found at W. Porth, *Personal Liability of Trustees of Educational Institutions*, 2 J.C.U.L. 143, 152-53 (1974-75).

[538] 200 S.W. 510 (Tenn. 1918).

[539] 243 S.W. 304 (Tenn. 1922).

[540] 168 S.E.2d 883 (Ga. Ct. App. 1969). The standard of care for the director's vicarious liability appeared to be the same as if she had been personally involved. "Children of tender years are entitled to that degree of care proportioned to their ability to foresee and avoid perils that may be encountered." (*Id.* at 885).

[541] See Bruner v. University of S. Miss., 501 So. 2d 1113 (Miss. 1987); Pelotte v. Simmons, 152 S.E. 310 (Ga. Ct. App. 1930).

[542] See cases discussed in L. BUZZARD AND T. BRANDON, JR. CHURCH DISCIPLINE AND THE COURTS (1986).

suits highlight the vulnerability of board members to litigation for unpopular or unwarranted decisions.

Indemnification

Since most board members of nonprofit educational institutions generally consider their duties to be a charitable service and serve without compensation, it is not unreasonable that many such institutions may want to indemnify board members against any liabilities incurred by reason of their service. However, such indemnification will be limited by the charter or bylaws of the corporation or by a separate agreement with the board members, subject in all cases to whatever further limitations the statutes or decisions of the jurisdiction of incorporation may impose. The Model Business Corporation Act, which has been adopted in at least half the states, permits indemnification for a board member if

> (1) he conducted himself in good faith; and
>
> (2) he reasonably believed (a) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests, and (b) in all other cases, that his conduct was at least not opposed to its best interests; and
>
> (3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.[343]

The Model Act prohibits indemnification in situations where a board member "shall have been adjudged to be liable on the basis that personal benefit was improperly received by him,"[344] where limited by the articles of incorporation,[345] or where rejected by a court of appropriate jurisdiction.[346] Board members need to carefully check statutes regulating nonprofit corporations in their own states because some states have limited the right of nonprofit corporations to indemnify board members beyond the limitations in the Model Act.[347]

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[343] MODEL BUS. CORP. ACT § 5(a)(6).
[344] *Id.* at § 5(e).
[345] *Id.* at § 5(d).
[346] *Id.*
[347] *E.g.*, New York prohibits indemnification where an "officer or director is adjudged to have breached his duty to the corporation" by failing to discharge his duties "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." N.Y. NOT-FOR-PROFIT CORP. LAW §§ 717, 722 (McKinney 1980). The New York statute is exclusive in that it specifically declares invalid any bylaw or other provision for indemnification of officers and directors which is not consistent with the statute. *Id.* at § 721.

Liability Insurance

It can probably be assumed that all nonprofit educational corporations have purchased liability insurance to protect board members against personal liability and that the coverage is as broad as is necessary in dollar amount and activity coverage to be commensurate with the scope of the corporation's functions. However, insurance protection would not apply in situations where state law prohibits indemnification, and whether a nonprofit institution could authorize and properly expend its funds to provide insurance protection beyond those areas for which it is authorized to indemnify is questionable.[548] In some states, nonprofit corporations are permitted to purchase insurance coverage beyond the indemnification allowed by statute.[549] However, a recent trend worth noting is that some states have legislated that uncompensated directors of nonprofit organizations are immune from lawsuits.[550] Obviously each nonprofit educational institution needs to review carefully its own insurance coverage in light of applicable state law.

Closing a School

A board decision to close a religious school can raise a variety of legal issues. Obviously, such a decision can be devastating to parents and students if an alternative school is not readily available and to employees if similar employment in the area is unlikely.

The parents' and students' interests were raised in the case of *Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory School, Inc.*[551] In *Immaculata*, legal title to the property of elementary and secondary schools separately incorporated was retained by a religious order. In 1972, the order decided to eventually sell the property because of declining enrollment and decreasing income and because deficits were being made up by borrowing from the order's retirement fund. After unsuccessfully attempting to sell the property to the Archdiocese of Washington, the order entered into a noncontractual letter of intent in July 1983 to sell the property to American

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[548] Porth, *supra* note 536 at 90.

[549] *See e.g.* N.Y. NOT-FOR-PROFIT CORP. LAW § 727 (McKinney 1990).

[550] *E.g.* DEL. CODE ANN. tit. 10, § 8133 (Supp. 1992) (uncompensated trustees, directors, officers, agents or workers not subject to suits for civil damages); OHIO REV. CODE ANN. § 2305.38 (Baldwin 1993) (uncompensated officers, trustees or other persons not liable for civil damages); VA. CODE ANN. § 13.1-870.1 (B) (Michie 1993) ("An officer or director who serves [a corporation exempt from income taxation under sec. 501 (c) of the Internal Revenue Code] without compensation shall not be liable for damages [arising out of a single transaction, occurrence or course of conduct].")

[551] 514 A.2d 1152 (D.C. 1986).

University. Parties to the letter of interest agreed to maintain confidentiality of its contents. The Holy See at Rome granted permission to sell the property in July 1984 (a necessary condition for this sale), but in the meantime freshman high school students were admitted for the fall 1983 and 1984. Not until October, 1984, after the school year had begun, did the order announce the schools would be closed in 1986. Unable to effect a change, parents and students brought suit against the order and the schools alleging violation of express and implied trusts, as well as breach of contract, fraud and unlawful trade practices.

Before resolving the legal theories, the court declared that a determination regarding disposition of church property involved "familiar corporate and trust principles of law"[352] and therefore did not run afoul of the first amendment religion clauses.[353] In rejecting the breach of trust argument, the court refused to accept that the parents and children had an equitable interest, even though the order had legal title. The court refused to construct a trust where the school corporation's articles of incorporation provided that all assets would revert to the order in case of dissolution. Students did not have a four-year contract for education once they were admitted as freshman because "as a matter of law the term of the individual contracts was for a single year."[354] There was no evidence of misrepresentation or fraud because final approval to sell was not received until several months after students had been accepted in April and May 1984. But even if the order had known about the closure prior to April and had not disclosed it, there would have been no fraud because the parents received the year's education for which they had paid. Finally, the order was not subject to the District of Columbia Consumer Protection Procedures Act because under this act, a nonprofit educational institution is not a merchant.

Access to Tax-Exempt Bonds and Other Public Funds

One of the more popular strategies used by governing boards of nonpublic educational institutions involves accessing public funds for expansion, restoration, or coverage of short-term indebtedness. Tax-exempt bonds have an advantage because interest rates are low, and because, for the investor, interest is not taxable by the state. But not all educational institu-

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[352] *Id.* at 1156.

[353] For discussions of application of neutral principles of law to religious institutions, see Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

[354] *Immaculata*, 514 A.2d at 1158.

tions qualify for tax-exempt bonds. For example, in *State v. Palm Beach County*,[355] an elementary and secondary school that had been converted from for-profit to not-for-profit status was not eligible to receive $3,214,000 in industrial revenue bonds that had been issued for use in refinancing a capital improvement loan ($2,050,000), constructing a gymnasium ($600,000), and covering the cost of issuing the bonds ($64,000). The court, having determined that the school had been improperly incorporated under the wrong not-for-profit statute, decided that the correct statute did not permit reception of tax-exempt bond revenues. Obviously, this kind of decision could have devastating effects on a school with high indebtedness and numerous creditors.

In another case, Liberty University lost in its claim to $60,000,000 in tax exempt revenue bonds to be used to finance an indebtedness in excess of that amount.[356] However, rejection of access to tax-exempt bonds in this case was because the Virginia Supreme Court determined that, despite the University's effort to dilute church control and religious influence, the University continued to be pervasively sectarian. As suggested in both *Palm Beach County* and *Liberty University* by the reasons for which tax-exempt bond revenues were being sought, rejection of access to tax exempt funds can present considerable financial problems to the boards of directors and to administrators of cash-strapped institutions in dealing with persistent and angry creditors.

Access by religious institutions to tax-exempt bond revenues is not impossible. The United States Supreme Court has, over establishment clause objections, upheld the issuance of tax-exempt bonds to a religious higher education institution to construct, finance and refinance projects.[357] However, under state law the bond proceeds could not be used to finance a facility used for religious purposes, and even after repayment of the bonds the facilities could not be used for such purposes. This decision involving tax-exempt bonds is compatible with an earlier Supreme Court decision in *Tilton v. Richardson*[358] in which federal construction grants were made available to church-related colleges and universities, provided that buildings financed with these funds were never used for sectarian instruction or for religious worship.

Access to other forms of public funding tends to depend on both the level of instruction and the person considered to be the recipient of the aid. The child benefit theory, popularized by the Supreme Court thirty years ago as a

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[355] 575 So. 2d 652 (Fla. 1991).

[356] Habel v. Industrial Dev. Auth. of Lynchburg, Va., 400 S.E.2d 516 (Va. 1991). For a discussion of this case, see Mawdsley, *Access to Tax Exempt Bonds by Religious Higher Education Institutions*, 65 EDUC. L. REP. 289 (1991).

[357] Hunt v. McNair, 413 U.S. 734 (1974).

[358] 403 U.S. 672 (1971).

legal fiction to justify state aid to religious elementary and secondary schools[559] has experienced a recent resurgence.[560] Although most state aid is made available to the nonpublic school, some state assistance may go directly to parents who have children in nonpublic schools.[561] However, access to any form of public funding is a fragile balance between the nature of the institution and the nature of the aid, as suggested by the next section.

Defining the Mission of a Religious School

Special problems of access to financial benefits have forced governing boards of religious schools to define and maintain the institution's religious mission. Although maintenance of an institution's religious identity may carry loss of some financial benefit,[562] the issues involved are more systemic than just eligibility for public funds. For educational institutions with church affiliation, boards of trustees must determine what degree of church control will best serve the overall interests of the institution. While church-controlled schools may have difficulty of accessing many forms of public funds, church control offers benefits that might be attractive to some schools and their employees. For example, church-controlled organizations are generally exempt from participation under state unemployment compensation

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[559] *See* Everson v. Board of Educ., 330 U.S. 1 (1947) (public school district provision of transportation to religious school students not violation of establishment clause); Board of Educ. of Cent. Sch. Dist. v. Allen, 392 U.S. 236 (1968) (public school district loaning textbooks to religious schools not violation of establishment clause).

[560] *E.g.*, *see* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2141 (1993) (sign interpreter for deaf student in religious school paid for by public school district considered as benefit to student and not the school, so no establishment clause violation); Minnesota Fed'n of Teachers v. Mammenga, 500 N.W.2d 136 (Minn. Ct. App. 1993) (high school students permitted to enroll in pervasively religious college as part of state's Post-Secondary Enrollment Options Act where state paid tuition held not to violate state or federal religion clauses); Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992); Pulido v. Cavazos, 954 F.2d 912 (8th Cir. 1991) (method of calculating distribution of Title I funds for services to religious schools not violative of establishment clause where students considered to be direct beneficiaries); Witters v. Washington Dep't of Serv. for the Blind, 106 S. Ct. 748 (1986) (state vocational assistance to blind student at Bible college not violative of federal establishment clause where student, not college, considered to be direct beneficiary).

[561] *See* Zobrest, *supra* note 560 (parents entitled to school district reimbursement under IDEA for monies expended to provide sign interpreter in religious school); Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1991) (parents entitled to reimbursement from public school district under IDEA for unilateral placement of child in private school where school district had failed to provide free appropriate public education).

[562] *See* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (loss of tax exempt status for refusal to eliminate religion-based rules prohibiting interracial dating and marriage); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (loss of veterans benefits because of racially discriminatory rules).

statutes[563] and they can be exempt from Social Security[564] and ERISA requirements.[565] However, the pressure today seems directed towards severing or at least diluting church control, either to distance the institution from political denominational dissension[566] or to gain access to financial benefits.[567]

While detrimental church control may be viewed from the standpoint of political strife or financial funding, the alternative of no church control may present other problems. Absence of church control may mean an increased likelihood that the NLRB or the state labor relations boards could assert jurisdiction over the educational institution.[568]

Even more ominous is the possibility of the schools losing protection under the religious exemptions in Title VII which permits discrimination on the basis of religion. In the recent case, *EEOC v. Kamehameha Schools/Bishop Estate*,[569] the Court of Appeals for the Ninth Circuit determined that lack of church control denied the Schools protection under Title VII religious exemptions. In *Kamehameha*, the Schools had been established in 1896 pursuant to a bequest that required teachers to be Protestant. When a non-Protestant was refused a teaching position, the applicant filed suit under Title VII and the Schools defended under the same statute, claim-

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[563] *E.g.*, OHIO REV. CODE ANN. § 4141.01(B)(3)(h)(i) (Baldwin 1994) (exempt from unemployment compensation are employees "in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, primarily supported by, a church, convention, or association of churches.")

[564] 42 U.S.C. § 410(a)(8)(B) ("Service performed in the employ of a church or qualified church-controlled organization," provided an exemption has been filed by the IRS, is exempt from coverage under the Social Security Act).

[565] 29 U.S.C. §§ 1002(33)(A), 1321(b)(3); 26 U.S.C. § 414(e)(3)(B) (church benefit plans exempt from reporting and disclosure requirements of Employee Retirement Income Security Program for "a church or ... a convention or association of churches [and] an employee of an organization ... which is controlled by or associated with a church or a convention or association of churches." Under § 414(e), a church of convention or association of churches is one "which is exempt from tax under section 501.")

[566] *See Georgia Baptists Reject Fundamentalist Plan to Control Mercer University*, CHRON. OF HIGHER EDUC., Nov. 18, 1987, at A1; *Trustees Limit Baptist Control Over University*, N.Y. TIMES, Oct. 21, 1990, at 47; *Baptist Board OKs New Governing Plan for Baylor University*, HOUS. POST, Sept. 11, 1991, at A1; *Fundamentalist Love Bid To control Baylor*, WASH. POST, Nov. 12, 1991, at A3.

[567] *Cf. Falwell Tells 2,000 Employees To Join His Church or Lose Job*, ATLANTIC JOURNAL CONSTITUTION, March 11, 1989, at A4 (effort to require church membership of all employees of several organizations considered to be controlled by the church); *with Falwell's College Alters Mission to Keep Alive*, N.Y. TIMES, Aug. 19, 1992, at B7 (later decision to reduce church control over university, including church membership requirement for faculty and students, to attempt qualification for tax exempt bonds and to satisfy creditors).

[568] *E.g., see* NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991) (NLRB election required for non-teaching employees in Catholic school); Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board had jurisdiction over lay teachers).

[569] 780 F. Supp. 1317 (D. Haw. 1991), *rev'd*, 990 F.2d 458 (9th Cir. 1993), *cert. denied* Kamehameha Sch./Bishop Estate v. EEOC, 114 S. Ct. 439 (1993).

ing that they were entitled to discriminate on the basis of religion. The Court of Appeals denied a Title VII religious exemption to the Schools on the basis of the factual pattern of the case: no religious organization supported or controlled their Schools and the Schools were not affiliated with "any denomination of Protestants or with any organization or with any association of religious schools;"[370] the Schools were part of the Bishop Estate, "a large and overwhelmingly secular business," that made no mention of religion in its annual reports;[371] the faculty, while nominally Protestant, were not required to maintain membership in a church and did not have to subscribe to a set of beliefs, and the Chaplain, who taught religious education and was pastor of the Bishop Memorial Church, had no authority over the curriculum;[372] religious affiliation was not taken into consideration for the 3,000 boarding and day students and the more than 36,000 other students reached through off-campus and outreach programs;[373] the wide variety of student activities did not differ appreciably from public and private schools across the nation;[374] and the curriculum, while incorporating some religious songs, prayer, and religious courses, lacked any "effort to instruct students in Protestant doctrine . . . [and] disavowed any effort to convert non-Protestant students."[375]

The application of *Kamehameha* is difficult to predict. There is wide variation among religious nonchurch-controlled schools as to the religious requirements imposed on students and employees. Elaborate religious requirements that at one time might have included attendance at and participation in religious services on campus by employees, as well as requirements concerning church attendance off-campus, may well have, over the years, been made voluntary and finally eliminated. After *Kamehameha*, nonchurch controlled schools may find that a court will scrutinize not only the nature of religious influence in the schools, but also the extent to which the religious influence has increased or decreased. In *Kamehameha*, the court examined school publications which revealed that "the purpose and emphasis of the Schools had shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to

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[370] *Kamehameha*, 990 F.2d at 461 (the Court of Appeals considered important the fact that the Bishop Memorial Church, which was controlled by the Schools, was a member of the Hawaii Conference of the United Church of Christ, but the Schools themselves were not).

[371] *Id.*

[372] *Id.* at 462.

[373] *Id.* (less than one-third of the on-campus students were Protestant).

[374] *Id.* (the court noted that some of the activities such as Bible studies and prayer before athletics can be found in public schools; in addition, major events such as Founder's Day and Baccalaureate incorporated celebrations of both religion and Hawaiian culture).

[375] *Id.* at 463 (the court seemed to consider important a curricular change that no longer made a religious course mandatory).

make their own moral judgments."[376] Diminution in religious influence was indicated by such changes as: a decrease in the number of students from the Schools participating in religious deputation services;[377] a reduction of a religious course being required for each student each year to being required only for freshmen;[378] and a change of course content from an emphasis on the religious faith of the school (Protestantism, in this case) to a comparative study of religion and the local culture (in this case, the Hawaiian culture).[379] Thus, nonchurch-controlled educational institutions could face judicial examination in two linear directions: the nature of religious requirements imposed on faculty, students, and the curriculum, and the extent to which current religious requirements have been diluted over the years.

On the basis of the facts of *Kamehameha*, the case would seem to have little application to many religious educational institutions which, although not church affiliated or controlled, nonetheless have maintained a significant core of religious content. However, the court of appeals suggested that a broad interpretation of its decision was warranted by the history of Title VII litigation. The court found "no case holding the [Title VII] exemption to be applicable where the [educational] institution was not wholly or partially owned by a church."[380] As further support for its interpretation, the court referenced a statement of a member of Congress that the Title VII exemptions were "limited to church affiliated colleges and universities, part of whose mission . . . is to propagate the belief of the denomination that is supporting the educational institution."[381]

Whether the precedential value of *Kamehameha* will be limited to its facts remains to be seen, but the court has clearly sent some cautionary signals that nonchurch-controlled religious schools may well be viewed differently from church-controlled schools in terms of protection under Title VII. For governing boards, the difficult balancing task will be to determine whether any advantages that come to the school from church control are offset by political dissension and lack of access to financial resources. The factors on both sides need to be carefully weighed, because once a school diminishes church control and dilutes religious influence, it is doubtful that the school can ever go back.

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[376] *Id.* at 462.
[377] *Id.* at 462-63.
[378] *Id.* note 10.
[379] *Id.* at 464, 465.
[380] *Id.* at 461, note 7.
[381] *Id.* at 464, quoting from Representative Purcell, 110 Cong. Rec. 2585-86, Feb. 8, 1964.

CHAPTER IV

GOVERNMENTAL REGULATION OF NONPUBLIC SCHOOLS

Basis for State Regulation

The range of nonpublic education in the United States is considerable, from home instruction by parents of their own children to prestigious private schools, with or without religious affiliation.[382] The continuing growth in nonpublic education[383] cannot be tracked simply to a disenchantment with or an antipathy toward public schools.[384] The central factor in this growth is a basic concern of parents that they should be able to determine the forum of their children's education.[385]

While not itself the sole cause for withdrawal of children from a public school, the inability of parents to affect changes in public school programs or curriculum because of judicially imposed impediments has probably contributed to parental and student frustration.[386] Parents have often attempted to first seek changes in public schools either because they could not agree philosophically with available nonpublic schools[387] or because they

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[382] For numerical data on growth among nonpublic schools, see Cooper, *"The Changing Universe of U.S. Private Schools,"* in COMPARING PUBLIC AND PRIVATE SCHOOLS (T. James and H. Levin, eds.) Vol. 1, 18-45 (1988). For a general history of nonpublic schools, see O. KRAUSHAAR, AMERICAN NONPUBLIC SCHOOLS (1972) and RELIGIOUS SCHOOLS IN AMERICA: A SELECTED BIBLIOGRAPHY (Hunt and Carper, eds. 1986).

[383] For representative figures on two large Christian day school organizations, see Cooper, *supra* note 382, at 33 (62% increase in enrollment in evangelical schools from 1965-1983); Carper, *The Christian Day School Movement*, THE EDUCATIONAL FORUM (Winter 1983).

[384] Public education has not been without its detractors in the past. For example, see RUSHDOONY, THE MESSIANIC CHARACTER OF AMERICAN EDUCATION (1963) and TOWNS, HAVE THE PUBLIC SCHOOLS HAD IT? (1974). More recently, criticism of public education has focused on state choice initiatives where parents could receive public funds to enroll children in nonpublic schools. For a debate on the topic of choice, see Tancredo, *The Case for Vouchers*, 71 EDUC. L. REP. 593 (1992) and Underwood, *Choice is not a Panacea*, 71 EDUC. L. REP. 599 (1992).

[385] For the role of parents, as representing community values, in seeking to effect curricular change, see R. Mawdsley and D. Drake, *Involving Parents in Public Schools*, 76 EDUC. L. REP. 299 (1992).

[386] For a discussion of related problem areas, see R. Mawdsley, and A. Mawdsley, *Diminished Status of Religious Liberty in Public Education: Interpreting Mozert and Smith*, 46 EDUC. L. REP. 897 (1988) (inability of parents for religious reasons to effect curricular changes in public schools).

[387] The philosophical differences divide themselves essentially into three categories. A first group would argue against all formal schooling outside the home. *See* State v. Bowman, 653 P.2d 254 (Or. Ct. App. 1982). A second group would consider a nonpublic school only if it were philosophically consistent with the parent's views. *See* State v. Riddle, 285 S.E.2d 359 (W. Va. 1981). A third group would oppose all attempts to remove children from public

were economically unable to afford the cost of nonpublic education.[588] For those parents who have selected nonpublic education, the schools have designed programs to make the needs of student clientele compatible with the philosophical orientation of the school.[589] To the extent that the education market in general could operate according to free enterprise supply and demand economic principles, it might be possible to secure a fairly accurate index of student needs as related to the cost of supplying those needs.[590] However, the massive public education system in the United States supported by local property taxes and a variety of state and federal tax sources has made the determination of costs of educational services in the general education market difficult to assess and the availability of special educational services in the nonpublic educational arena difficult for many to obtain financially.[591] With state commitments to preservation of their public educa-

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schools and would seek to reform the public schools, by litigation if necessary. *See* Smith v. Ricci, 446 A.2d 501 (N.J. 1982).

[588] For information regarding the relative cost of public and nonpublic education, see J. WHITEHEAD AND W. BIRD, HOME EDUCATION AND CONSTITUTIONAL LIBERTIES (1984). The most significant detraction from such a selection of nonpublic education is finances. The two most direct proposed solutions are some form of government tax assistance to parents of nonpublic school pupils or a nonpublic school scholarship program especially directed at the disadvantaged. On the former see E. West (ed.), NONPUBLIC SCHOOL AID (1976); and on the latter, see Crain and Rossell, *"Catholic Schools and Racial Segregation,"* in PUBLIC VALUES, PRIVATE SCHOOLS (N. Devins, ed.) 184-214 (1989).

[589] See Kraushaar, *supra* note 582 at 6-8 where a variety of distinctives for nonpublic schools are referred to. For a philosophical model for religious schools, see J. CUNNINGHAM AND A. FORTOSIS, EDUCATION IN CHRISTIAN SCHOOLS: A PERSPECTIVE AND TRAINING MODEL (1987); P. KUNEL, CHRISTIAN DAY SCHOOLS: AN INTRODUCTION TO BIBLICAL CHRISTIAN EDUCATION (Graendorf, ed.) (1981). The interrelationship of Christian education and secularization is discussed in K. GANGEL AND W. BENSON, CHRISTIAN EDUCATION: ITS HISTORY AND PHILOSOPHY (1983). For a discussion of the role of nonpublic schools in general in today's society, see E. McGLYNN GAFFNEY, PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES (1981).

[590] See Levin, *"Education as a Public and Private Good"* in PUBLIC VALUES, PRIVATE SCHOOLS (D. Nevins, ed.) 215-232 (1989). An excellent discussion of the desirability and feasibility of administering education on a free enterprise model is found in West, *supra* note 588. A pointed question by E. West, "Are we more egalitarian than libertarian?" reflects the economic tensions between the state supported public educational system and the largely privately financed nonpublic system. *Id.* at 53.

[591] Mueller v. Allen, 103 S. Ct. 3062 (1983) (state tax deductions permitted for tuition, textbooks and transportation but that offers nothing in the way of financial resources for those who cannot afford the initial dollar investment in public education). However, see Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (under IDEA public school district could be required to provide sign language interpreter for a deaf student in a Catholic school); Florence County Sch. Dist. v. Carter, 114 S. Ct. 361 (1993) (parents entitled to reimbursement under IDEA for unilateral placement of child in out-of-state private school not on state's approved list where school district had not provided "free appropriate public education").

tional system have come a wide variety of approaches to maintaining the quality of education within a state.[302]

In two early United States Supreme Court cases, *Meyer v. Nebraska*[303] and *Pierce v. Society of Sisters*,[304] the Court prohibited a state from defining and controlling the quality of education by disallowing certain subjects or by requiring attendance at public schools. Although frequently cited as establishing the legal right of parents to direct the education of their children, the court subsequently stressed in *Runyon v. McCrary*[305] that *Pierce* was "simply affirm[ing] the right of private schools to exist and to operate."[306] More recently, the Supreme Court has endorsed quality education as that which is not racially discriminatory[307] and it has suggested that such education must be free of gender discrimination.[308]

No court has ever declared that nonpublic schools are immune from government regulation. Very early in *Pierce*, the Supreme Court stated that "no question is raised concerning the power of the State, reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."[309] Subsequent courts have had to wrestle with determining the reasonableness of government's regulatory efforts. Indeed, from the nonpublic school's perspective, the issue may more properly be whether a state agency which cannot prohibit outright the operation of nonpublic schools[310] may nonetheless regulate them out of existence by imposing statutory or regulatory requirements which nonpublic schools cannot meet.

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[302] In cases involving state attempts to regulate nonpublic education the U.S. Supreme Court has repeatedly emphasized that control of the quality of education is a state function. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). But the Court has stopped short of declaring public education to be a fundamental constitutional right. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[303] 262 U.S. 390 (1923) (state prohibition of teaching of German in public or private schools interfered with right of parents with children in religious school to direct children's education).

[304] 268 U.S. 510 (1925) (state statute requiring attendance at public schools "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children").

[305] 427 U.S. 177 (1976).

[306] *Id.* at 177 (1976) (successful section 1981 claim against racially discriminatory nonsectarian private school).

[307] Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (revocation of tax exempt status upheld because of racially segregated dating and marriage rules).

[308] *See* Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 578 F. Supp. 1004 (S.D. Ohio 1984), *rev'd*, 766 F.2d 932 (6th Cir. 1985), remanded to state commission, 106 S. Ct. 2718 (1986) (gender based discrimination grounded on religious doctrine requiring female employees to quit for purpose of staying home with baby may be protected by free exercise of religion but "elimination of prohibited sex discrimination is sufficiently important state interest"), 106 S. Ct. at 2723.

[309] *Pierce*, 268 U.S. at 534.

[310] The United States Supreme Court in *Pierce* invalidated under the due process clause an Oregon statute which would have required attendance only at public schools. Successful plaintiffs were a Catholic and a private military school.

Schools With a Religious Nexus

The application to states of the religion clause in 1940[601] meant that state regulation of religious conduct must have something other than merely a rational purpose.[602] In *Wisconsin v. Yoder*,[603] the United States Supreme Court had occasion for the first time to determine the validity of a state's enforcement of its compulsory attendance statute against the protective standards of the free exercise clause. In that case, the court developed a three-fold test to determine the constitutionality of state attempts to regulate religious education: (1) whether or not the activity objected to by the state is motivated by and rooted in legitimate and sincerely-held religious beliefs;[604] (2) whether or not the parties' free exercise of religion has been burdened by the state's action and by the extent of or impact on their religious activity;[605] and whether or not the state has a compelling interest for its actions that justifies the burden imposed on the parties' religious activity.[606] However, the viability of the compelling interest was placed in doubt by *Employment Division v. Smith*[607] where the Supreme Court disallowed use of the *Yoder* compelling interest test when a "neutral, generally applicable law"[608] was being applied. The only exception to the *Smith* alteration of *Yoder* was where a free exercise claim was linked with another constitutional right, such as parental direction of children's education.[609] The constitutional status of the free exercise clause has been made even murkier by passage of the Religious Freedom Restoration Act[610] which has as one of its purposes, "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* . . . ."[611] A recent Fourth Circuit Court of Appeals decision, *Fairfax Covenant Church v. Fairfax County School Board*,[612] further adds to the confusion. Without mentioning either *Smith* or the Religious Freedom Restoration Act, the court relied on four Supreme Court decisions

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[601] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[602] *See Pierce*, 268 U.S. at 535 (under the due process clause, the Oregon statute had "no reasonable relation to some purpose within the competency of the state").

[603] 406 U.S. 205 (1972).

[604] *Id.* at 216-16.

[605] *Id.* at 217-19.

[606] *Id.* at 219-34.

[607] 494 U.S. 872 (1990).

[608] *Id.* at 880-881.

[609] For a discussion of the aftermath of the *Smith* case on claims under the free exercise clause, *see* Mawdsley, *Employment Division v. Smith Revisited: The Construction of Free Exercise Rights Under the U.S. Constitution*, 76 EDUC. L. REP. 1 (1992).

[610] 42 U.S.C. §§ 2000bb-2000bb-4.

[611] In Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court required the government to prove that its regulation was the least restrictive means of accomplishing its interest.

[612] 17 F.3d 703 (4th Cir. 1994).

favoring religion[611] to find that a school board lacked a compelling interest in setting differential rental rates for school property so that churches paid more than nonreligious groups.[614] The school board's rationale that extended use of public school facilities could be interpreted as "domination"[615] prohibited by the establishment clause was held by the Fourth Circuit Court of Appeals to be an "unfounded . . . view of the First Amendment." Since the *Fairfax* court found the ordinance to have violated churches' free speech, the *Yoder* compelling interest analysis would be appropriate even under *Smith*. But the complete silence in *Fairfax* concerning both *Smith* and the Religious Freedom Restoration Act leads one to wonder whether the *Smith* holding is still relevant and whether the statute was necessary.

Beyond the free exercise clause, the United States Supreme Court has suggested that governmental regulatory efforts may also run afoul of the establishment clause as interpreted in *Lemon v. Kurtzman*.[616] However, the Lemon test, formulated as it was in the context of governmental aid to religious schools,[617] has offered limited protection to religious educational institutions.[618] The *Lemon* test with its three parts has become the standard

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[611] Widmar v. Vincent, 454 U.S. 263 (1981) (public university having designated its campus as a public forum could not restrict religious student meetings); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (Equal Access Act permitting student-initiated religious meetings at public high schools not violative of Establishment Clause); Lambs Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (school district refusal to permit religious group to use school facilities during non-school hours an impermissible content-based free speech violation); Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993) (city ordinance directed at Santeria religion practice of animal sacrifices violative of free exercise).

[614] The ordinance read as follows: "Churches, religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years. . . . Church/religious groups may be authorized usage after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use." *Fairfax*, 17 F.3d at 705.

[615] See *Widmar*, 454 U.S. at 275 (the Supreme Court implied that even in a public forum setting an Establishment Clause violation could occur if a religious group dominated the open forum). In *Fairfax*, the school board's argument was that a combination of low rents and extended use by churches could amount to such domination, but the court of appeals found no facts to support that speculation and the rents charged (at least for the first five years before rental charges escalated significantly for churches) were the same for both religious and nonreligious organizations. *Fairfax*, 17 F.3d at 708-709.

[616] 411 U.S. 192 (1973) (all 3 tests stated for the first time in this case, although the first two tests originated in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963)).

[617] See School Dist. of Grand Rapids v. Ball, 105 S. Ct. 3216 (1985) (Share Time and Community Education classes taught in religious schools by teachers paid by public school district a violation of *Lemon* test); Aguilar v. Felton, 105 S. Ct. 3232 (1985) (teaching of Title I programs in religious schools by teachers paid by public school district violation of *Lemon* test).

[618] Cf. Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992) (judicial intervention into terms of employment for those who perform ministerial functions would constitute excessive entanglement under Lemon test) with Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992) (judicial intervention as to whether two nuns had been improperly dismissed not excessive entanglement where employment contracts had not incorporated Canon Law or religious requirements).

measure for interpreting the establishment clause:[619] whether the statute or regulation has a secular purpose; whether the statute or regulation has the primary effect of advancing or inhibiting religion; and whether the statute or regulation will result in excessive entanglement between the state and the religious school.

In *National Labor Relations Board (NLRB) v. Catholic Bishop of Chicago*,[620] the United States Supreme Court had occasion to determine under the *Lemon* test whether Roman Catholic schools could be required by the National Labor Relations Board to permit representation elections for lay teachers in diocesan schools. In discussing the NLRB interest in promoting and protecting labor peace and the school's interest in protecting and promoting its religious doctrine, the court observed that negotiation of terms and conditions of employment would involve the NLRB in "nearly everything that goes on in the schools."[621] *Catholic Bishop* announced a three-step level of analysis for resolving the conflict between statutory language and constitutional infringement. The first step is to determine whether government action represents a "substantial risk" of constitutional infringement.[622] A court need not decide that an infringement has occurred, only that an infringement might occur.[623] If a "substantial risk" of infringement exists, the second step is to determine whether the legislative intent was to apply the statute to the religious institution. The general legal principle is that a case will not be resolved on constitutional grounds if it can be resolved on statutory grounds.[624] If the court determines that the legislative intent was to exclude the religious institution, the *Catholic Bishop* analysis is

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[619] Cases where government involvement in religious activity has not been evaluated according to the tripartite *Lemon* test are notable for their infrequency. *See* Lee v. Weisman, 112 S. Ct. 2649 (1992) (school sponsored prayers invalidated because of psychological coercion test); Marsh v. Chambers, 463 U.S. 783 (1983) (legislative practice of prayer before each session upheld on basis of length of practice in United States history without reference to *Lemon* test).

[620] 440 U.S. 490 (1979).

[621] *Id.* at 502-03.

[622] *Id.* at 506.

[623] *See* NLRB v. St. Louis Christian Home, 663 F.2d 60, 65 (8th Cir. 1981) (in response to allegation by Home that it might have to disclose source and destination of contributions from affiliated Christian Church if collective bargaining required for its employees, the court observed that "[t]he Home has not demonstrated that such impairment will likely occur"); Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB, 752 F.2d 345, 249 (8th Cir. 1985) (Ranch's claim that NLRB might intervene if staff were to be disciplined for not carrying out duties related to Ranch's religious tenets held to be insufficient to deprive NLRB of jurisdiction over maintenance, laundry, housekeeping and child care workers).

[624] *Catholic Bishop*, 440 U.S. at 500 ("An Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains," citing to Murray v. The Charming Betsy, 2 Cranch 118 (1804)). *But see* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2469-70 (four dissenting justices argued that this case involving publicly paid sign language interpreter assigned to parochial should have been remanded to a lower court for consideration of statutory and regulatory issues. "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

at end and the court will find in favor of the religious institution.[625] However, if the religious institution cannot be excluded by examining legislative intent, the court must move to the third step and address the merits of the constitutional objections under the Religion Clauses. An example of application of the *Catholic Bishop* test to the merits of a case is reflected in *New Life Baptist Church Academy v. East Longmeadow*.[626] In *New Life*, the court held that a state nonpublic school approval process which included on-site visits to evaluate classes not taught by college graduates did not represent, under the *Lemon* excessive entanglement interpretation of the establishment clause, "the over-arching control of the school's possibly religiously motivated choices that was struck down in *NLRB v. Catholic Bishop of Chicago* . . . ."[627]

Although the Court resolved *Catholic Bishop* on other than constitutional grounds, it suggested that inquiries into the practices of religious schools that did not "go beyond resolving factual issues" might be permissible.[628] But where the inquiry would involve conclusions to be drawn regarding "the good faith of the position asserted by the clergy administrators and its relationship to the school's religious mission" the process of inquiry as well as the conclusions drawn "may impinge on rights guaranteed by the Religion Clause."[629] *Catholic Bishop* has come to be interpreted to mean that the NLRB does not have jurisdiction over church-operated schools,[630] but that state labor relation boards do.[631]

Where a religious school alleges that application of a state statute may constitute a constitutional violation, the school may be required under the

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[625] *E.g.*, *see* Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989) (ADEA did not apply to Seminary where there was no language in statute or in legislative history suggesting that Congress intended to include church operated schools under ADEA). *See also* St. Martin Evangelical Church v. South Dakota, 451 U.S. 772 (1981) (state's unemployment system not applicable to church controlled schools where Congress had not expressed an intent to include them).

[626] 885 F.2d 940 (1st Cir. 1989).

[627] *Id.* at 953.

[628] *Catholic Bishop*, 440 U.S. at 502.

[629] *Id.*

[630] NLRB v. Bishop Ford Cent. Catholic High Sch., 623 F.2d 818 (2d Cir. 1980), *cert. denied* 450 U.S. 996 (1981) (NLRA not applicable to lay teachers in church controlled schools). But *see* NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991) (NLRB representation election required for non-teaching employees in Catholic school).

[631] Christ the King Regional High Sch. v. Culvert, 815 F.2d 219 (2d Cir. 1987), *cert. denied* 108 S. Ct. 102 (1988); Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board had jurisdiction over lay teachers in Catholic school). *But see* Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., Maplewood, 471 N.W.2d 372 (Minn. Ct. App. 1991) (application of state labor relations statute to religious school violated state and federal religion clauses).

abstention doctrine[632] to adjudicate its religious claims before the state administrative tribunal prior to a federal court's review of the case. To suggest that a state administrative agency, although enforcing its enabling statute and its own regulations, can resolve constitutional claims requires religious schools to cling to the rather tenuous hope that the agency can and will correctly interpret federal constitutional law. The right to appeal from an adverse administrative decision may not present an opportunity for a *de novo* hearing to raise constitutional claims.[633] The Supreme Court has held that federal courts must give the fact finding of a state agency, acting in a judicial capacity while resolving disputed issues of fact properly before the court which parties have had adequate opportunity to litigate, the same preclusive effect which such fact finding would have in the state's courts.[634]

Beyond the establishment clause, religious schools can also raise a defense under the free exercise clause in order to combat concern as to whether government will become excessively intrusive in the operations of nonpublic schools. Free exercise claims meet with mixed response from the courts. In *New Life Baptist Church Academy v. East Longmeadow*,[635] a federal court of appeals overturned a district court decision that a state's approval process requiring on-site visits was not the least restrictive means of accomplishing the state's interest in education. The court of appeals rejected the district court's determination that "standardized testing combined with individual follow-up when indicated"[636] was the least restrictive means. The appeals court reasoned that:

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[632] Basically, the abstention doctrine states that federal courts will abstain from asserting jurisdiction over a case involving constitutional claims as long as there is an ongoing state proceeding where the party has an adequate opportunity to present his constitutional claim. The doctrine was the key issue in the U.S. Supreme Court's disposition of *Dayton Christian Schools*, *supra* note 598. For a discussion of the doctrine, see R. Mawdsley *Challenges to Religious Liberties: Procedural Traps*, 37 EDUC. L. REP. 1 (1987).

[633] Appeals from administrative decisions generally must overcome an inference that the administrative ruling be given "considerable weight" or be supported by the facts [Florian v. Highland Local Sch. Dist., 493 N.E.2d 249 (Ohio Ct. App. 1983)] or must find support on a rational basis in the evidence [Leuphart v. North Carolina Sch. of the Arts, 342 S.E.2d 914 (N.C. Ct. App. 1986)]. A reviewing state court may be bound by an administrative agency's findings if supported by evidence on the record and applicable law [Ashbourne Educ. Serv. v. Commonwealth, Dept of Educ., 499 A.2d 698 (Pa. Commw. Ct. 1985)]. Generally, great deference is given to administrative interpretation of statutes which the courts are also asked to interpret. Western Reserve Academy v. United States, 619 F. Supp. 394 (D.C. Ohio 1985).

[634] University of Tenn. v. Elliott, 106 S. Ct. 3220 (1986) (preclusive effect of state administrative civil hearings on Title VII actions depends on preclusive effect granted by such hearings by state courts).

[635] 666 F. Supp. 293 (D. Mass. 1987).

[636] *New Life*, 666 F. Supp. 293, 320 (D. Mass. 1987). Some states use mandatory student testing as the method of evaluating student progress in nonpublic schools. *E.g.*, see ALASKA STAT. § 14.45.120 (1989); N.C. GEN. STAT. § 115C-549, 115C-550 (1993); S.D. CODIFIED LAWS ANN. 13-27-3 (1991); W. VA. CODE § 18-28-3 (1994).

> the 'testing' plan risked exposing still greater burdens upon individual parents, or children, insofar as it foresees the School Committee enforcing testing or remedial or alternative schooling obligations upon individual families, potentially through the use of the courts and potentially under circumstances where the Academy itself retains the state's approval . . . . Given the fact that the Academy has expressed a preference for standardized testing and the fact that the Academy is the best judge of its own religious needs and interests, we cannot say that standardized testing is no less burdensome than the School Committee's proposal, but neither can we see how it *substantially* alleviates the burden upon the free exercise of religion, nor how it can represent a major improvement.[637]

However, in *People v. DeJonge*,[638] the Michigan Supreme Court held that the state's teacher certification requirement was not the least restrictive means of protecting the state's interest in education and thus application of the requirement to parents who home schooled their children violated the parents' free exercise rights. In this case, the court found that the state had "failed to provide evidence or testimony that supports the argument that the certification process is essential to the preservation of its asserted interest."[639]

Schools Without a Religious Nexus

Educational institutions which have no religious nexus obviously can make no constitutional claim under either of the First Amendment religion clauses.[640] A substantive due process constitutional claim might be appropriate under a parents' liberty right to direct their children's education. However, in *People v. Bennett*,[641] the Michigan Supreme Court refused to apply a strict scrutiny analysis to this constitutional right where no free exercise claim was also involved. In the absence of a religious claim, the court refused to find that parents have a "fundamental right to direct all of their children's education."[642]

The United States Supreme Court ruled in *Runyan v. McCrary*[643] that

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[637] *New Life*, 885 F.2d at 950 (emphasis in original).
[638] 501 N.W.2d 127 (Mich. 1993).
[639] *Id.* at 140.
[640] *See State v. Andrews*, 651 P.2d 473 (Haw. 1982) (*Yoder* analysis not applicable where no religious claim).
[641] 501 N.W.2d 106 (Mich. 1993).
[642] *Id.* at 112.
[643] 427 U.S. 160 (1976).

section 1981 of the *Civil Rights Act*,[644] which prohibits discrimination on the basis of race in the making of contracts, applied to "private, commercially operated nonsectarian schools."[645] Despite the Court's obvious exclusion of religious institutions from the reach of section 1981 in *Runyon*, there is no reason to expect immunity for religious schools after the Court's decision in *Bob Jones University v. United States*,[646] which created an established public policy to eradicate racial discrimination.[647]

The absence of religion clause defense does not mean that nonsectarian educational institutions can be regulated in an arbitrary manner, a defense that applies equally well to sectarian schools. The Oregon Court of Appeals recently struck down a state statute providing that Oregon school and college members of the Northwest Association of Schools and Colleges did not have to meet certification requirements while non-Oregon schools and colleges had to satisfy the requirements regardless of whether they were members of the Association.[648] In finding that this statute violated the interstate commerce clause of the U.S. Constitution, the court determined that Oregon had failed to bear its burden of proving that its purpose of protecting state consumers from "the effects of substandard, transient, unethical, deceptive or fraudulent practices by out-of-state educational institutions . . . [could not be accomplished] by available nondiscriminatory means."[649] In *Philip Crosby Associates v. State Board of Independent Colleges*,[650] a plaintiff, maintaining classroom facilities to present management seminars, could not be prevented from using the word "college" since it did not offer degrees or offer courses which led to a degree. The Florida state appeals court determined that the State Board did not have statutory jurisdiction over

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[644] Title 42 U.S.C. § 1981 provides in part that "all persons within the jurisdiction of the United States shall have the same rights in every State . . . to make and enforce contracts . . . as enjoyed by white citizens . . ."

[645] *Runyon*, 427 U.S. at 168. The Court swept aside constitutional arguments based on freedom of association, parental rights and right of privacy because "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." *Id.* at 166.

[646] *Supra* note 597.

[647] *See* Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988) (section 1983 cause of action dismissed but section 1981 available to black and Latin students); Parker v. Trinity High Sch., 823 F. Supp. 511 (N.D. Ill. 1993) (section 1981 applies to dismissal of Afro-American students from Catholic school, but students had no claim where no intent to discriminate on basis of race was proved); Holland v. Board of Trustees of Univ. of D.C., 794 F. Supp. 420 (D.D.C. 1992) (section 1981 available to white persons). Section 1981 is available also for claims of discrimination based on ethnicity. *See* St. Francis College v. Al-Kazraji, 107 S. Ct. 2022 (1987). *But see* Bisciglia v. Kenosha Unified Sch. Dist. No. 1, 149 F.R.D. 588 (E.D. Wis. 1993) (Section 1981 not available to person alleging discrimination on basis of Italian ethnicity and/or Italian national origin).

[648] City Univ. v. State Office of Educ. Policy and Planning, 870 P.2d 222 (Or. Ct. App. 1994).

[649] *Id.* at 225.

[650] 506 So. 2d 490 (Fla. Dist. Ct. App. 1987).

non-degree granting institutions. But in *Nova University v. Educational Institution Licensure Commission*,[651] denial of a license for a nonresident university to offer a doctoral program in the District of Columbia was upheld on the basis of the reasonableness of the criteria pertaining to library resources and number of full-time faculty. On the other hand, in *Nova University v. Board of Governors*,[652] the North Carolina Supreme Court rejected a claim by the Board of Governors of the University of North Carolina that it could establish minimum criteria for out-of-state private schools. In *State v. Williams*,[653] the North Carolina Supreme Court held that state's regulation of certain kinds of private schools outside the state that solicited students within the state was an unwarranted delegation of power. But in *McMinn v. City of Little Rock*,[654] a local zoning commission was upheld in refusing to grant a zoning variance to a proposed Montessori school because there was no evidence that the commission acted "arbitrarily, capriciously and unreasonably."[655] However, in *Kirsch v. Prince George's County*,[656] a mini-dormitory zoning ordinance to prevent residential homeowners from renting to large numbers of university students was struck down under the Equal Protection Clause as not "rationally related to a legitimate governmental purpose."[657]

Generally, regulation of private schools will be left to the state's educational agencies. The normal deference paid to those agencies is reflected in *Paladino v. Adelphi University*:[658]

> The regulatory scheme requires that the quality of education provided by private institutions be closely monitored by the State Department of Education. If the school is not meeting its obligations, then the matter is capable of resolution within the educational system.[659]

Home Instruction

Probably the most frequently litigated issue is whether home instruction qualifies as a "private school" under state statutes exempting such schools

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[651] 483 A.2d 1172 (D.C. App. 1984)
[652] 287 S.E.2d 872 (N.C. 1982)
[653] 117 S.E.2d 444 (N.C. 1960)
[654] 631 S.W.2d 288 (Ark. 1982)
[655] *Id.* at 291
[656] 626 A.2d 372 (Md. 1993)
[657] *Id.* at 379
[658] 454 N.Y.S.2d 868 (N.Y. App. Div. 1982) (actually an educational malpractice and breach of contract action against an elementary school operated by the university)
[659] *Id.* at 872

from state regulation, or under statutes only minimally regulating them.[660] To assist their case, home instruction parents may in fact give their instruction program the name of a school.[661] While states do vary on how they define private schools, the most recent trend seems to be not defining home instruction as a private school.[662] Where a state compulsory attendance statute requires only "equivalent instruction," there is a difference of opinion as to whether home instruction is equivalent to public education.[663] Generally, the burden is on the parent to prove equivalency, but at least two states place the burden on the state.[664] In some cases, equivalency statutes have been discussed as possibly being flawed on vagueness grounds, while in others, courts have upheld the statutes easily.[665] Special statutes dealing specifically with home instruction have appeared recently and have tended to minimize ambiguity and litigation.[666]

Two recent Michigan Supreme Court decisions involving home schooling, one based on religious reasons, reflect the difficult policy issues at stake

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[660] *E.g.*, see WIS. STAT. ANN. § 118.15(1)(a) (West 1991) ("public or private school"); N.C. GEN. STAT. § 115C-378 (1993) (approved "public schools" or non-public schools); ARK. CODE ANN. § 6-15-502 (Michie 1993) (home school separate category from other kinds of schools).

[661] State v. Popanz, 332 N.W.2d 750 (Wis. 1983) (Free Thinker School); Delconte v. State, 329 S.E.2d 636 (N.C. 1985) (Hallelujah School); In Interest of Sawyer, 672 P.2d 1093 (Kan. 1983) (Longview school, Inc.); Strosnider v. Strosnider, 686 P.2d 981 (N.M. Ct. App. 1984) (Holy Innocents School).

[662] *Cf.* Cloudcara, Inc. v. State Bd. of Educ., 501 N.W.2d 88 (Mich. 1993) (home schools are schools other than a public school); People v. Levisen, 90 N.E.2d 213 (Ill. 1950); State v. Edgington, 663 P.2d 376 (N.M. Ct. App. 1983); and Strosnider v. Strosnider, 686 P.2d 981 (N.M. Ct. App. 1984) (home instruction a private school) *with* State v. Superior Ct., 346 P.2d 999 (Wash. 1960); State v. Lowry, 383 P.2d 962 (Kan. 1963); State v. M.M., 407 So. 2d 987 (Fla. Dist. Ct. App. 1982); State v. Bigelow, 334 N.W.2d 444 (Neb. 1983); Delconte v. State, 329 S.E.2d 636 (N.C. 1985) (home instruction not a private school).

[663] *Cf. In re* H., 357 N.Y.S.2d 348 (N.Y. 1974) (equivalency rejected) *with* State v. Massa, 231 A.2d 252 (N.J. Super. Ct. 1976) (equivalency upheld).

[664] See Wright v. State, 200 P. 179 (Okla. 1922); State v. Cheney, 305 S.W.2d 892 (Mo. 1957); State v. Pilkinton, 310 S.W.2d 304 (Mo. 1958); State v. Davies, 589 S.W.2d 189 (Mo. 1980); *In re* Monnig, 638 S.W.2d 782 (Mo. Ct. App. 1982).

[665] See Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987); Matter of Kilroy, 467 N.Y.S.2d 318 (N.Y. Fam. Ct. 1983); Bangor Baptist Church v. Maine, 576 F. Supp. 1299 (Me. 1983).

[666] *E.g.*, see VA. CODE ANN. § 22.1-254 (Michie 1993) where parents have minimal reporting requirements, no home visits are provided for, and in some cases a local public school superintendent is expressly denied evaluative judgment. This statute was in direct response to Griggs v. Commonwealth, 297 S.E.2d 799 (Va. 1982) where home instruction did not constitute attendance at a private school and the parents were not approved tutors or teachers under the state's separate provision for home instruction. *See also* N.C. GEN. STAT. 115C-564 (1993) (state regulation limited to two requirements: home instructors must have a high school diploma or equivalent, and home school students must take an annual achievement test); NEB. REV. STAT. § 79-1701 (1987) (parents who find existing state regulation to conflict with their religious beliefs can substitute an informational statement which declares that children attend school 175 days per year and are instructed in core curriculum subjects); LA. REV. STAT. ANN. § 17:236.1.D (West 1982) (curriculum equal to that offered in public schools); MINN. STAT. ANN. § 120.101.8 (West 1993); COLO. REV. STAT. ANN. § 22-33-104.5 (West 1988) (home school students take standardized tests). In addition, see MISS. CODE ANN. § 37-13-91 (1990) (home schools appear not to be regulated at all).

when religion is a factor. These two cases, ironically decided on the same day, reached opposite conclusions. In *People v. DeJonge*,[667] Michigan's teacher certification requirement for home schools under the compulsory attendance law violated the free exercise rights of parents whose religious convictions prohibited use of certified instructors. The *DeJonge* court applied a strict scrutiny test to find that the state needed a compelling interest that was "truly compelling, threatening the safety or welfare of the state in a clear and present manner."[668] However, in *People v. Bennett*,[669] the court ruled that the teacher certification requirement applied to parents whose objection was grounded only in the Fourteenth Amendment liberty interest to direct the education of their children. The *Bennett* court found that the constitutional right of directing children's education without an attendant religious claim was entitled to only a minimum scrutiny test demanding a burden of proof that the state need only produce evidence that teacher certification is reasonably related to its interest in education.[670] Under the minimum scrutiny test, the court found that teacher certification was "at least reasonably related to the state's legitimate interest" and that the burden rested on the parents "to show the unreasonableness of the certificate requirement."[671] However, in *DeJonge*, where strict scrutiny was the standard, the state had the burden "to prove that the certificate requirement was essential to [its] interest."[672] The *DeJonge* court further held the burden was not on the parents to prove that alternatives less intrusive than teacher certification exist. As a result of the court's reasoning in the two cases, the parents in *DeJonge* were exempt from the teacher certification requirement, while the parents in *Bennett* were subject to the same requirement.

The State and Compelling Interests

The United States Supreme Court has never clarified the limits of government regulatory intrusiveness into the operation of nonpublic schools. While the court in *Pierce* acknowledged the state's regulatory interests,[673] the *Yoder Court* provided only the broadest outline for a governmental compelling interest where the fundamental constitutional right of free exercise of religion is at stake. The *Yoder Court* defined a government's compelling

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[667] 501 N.W.2d 127 (Mich. 1993).

[668] *Id.* at 138.

[669] 501 N.W.2d 106 (Mich. 1993).

[670] *But see* Alfonso v. Fernandez, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993) (parental liberty interest in rearing and educating their children resulted in New York City public schools' policy of condom distribution in the schools being declared unconstitutional because the school board had not shown "an overriding necessity" for its policy.)

[671] *Bennett*, 501 N.W.2d at 117.

[672] *DeJonge*, 501 N.W.2d at 141.

[673] *See supra* note 594 and accompanying text.

interest in compulsory education to be a "degree of education . . . necessary to prepare citizens to participate effectively and intelligently in our open political system" and education "which prepares individuals to be self-reliant and self-sufficient participants in society."[674] The *Yoder Court* determined that Wisconsin's interest in literacy and marketable vocational skills for students could not override the Amish community's religious-based academic and vocational program.[675] However, the 300 years of Amish tradition and the religious homogeneity of the Amish community have allowed subsequent courts to limit the precedence value of Yoder.[676] Perhaps one prominent writer's pessimistic assessment that "society is giving way to the state, and communities exist now only as created and developed by minorities against the current"[677] is correct.

The absence of a clear direction by the United States Supreme Court has been translated into a tendency for state courts to define compelling interests in a very expansive manner. With very few exceptions,[678] state regulatory efforts have collided with the religious beliefs of private schools on relatively few issues, the most notable being attendance reporting[679] and teacher certification.[680]

One direction the absence of United States Supreme Court guidance has taken has been in a reduction of the compelling interest test to a bland reasonableness test. In *State v. Faith Baptist Church*,[681] the Nebraska Supreme Court declared with reference to a requirement of teacher certification for nonpublic schools that "the state has a compelling interest in the quality and ability of those who are to teach its young people" because "such requirement is neither arbitrary nor unreasonable" and because "reasonable government regulations as to the quality of education furnished appear to be very minimal in nature."[682] Similarly, in *Sheridan Road Baptist Church v.*

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[674] *Yoder*, 406 U.S. at 221.

[675] The authority of government to regulate religious practices can be traced back to United States v. Reynolds, 98 U.S. 145 (1879) where a constitutionally protected right to believe in polygamy as a religious belief did not extend to a protected right to practice such polygamy.

[676] *See generally*, Valente, EDUCATION LAW: PUBLIC AND PRIVATE, Vol. 2, 357-53 (1985). *See also Fellowship Baptist Church*, *supra* note 665 at 496-98.

[677] R. Rushdoony, INTELLECTUAL SCHIZOPHRENIA 96 (1973).

[678] *See* Ohio v. Whisner, 351 N.E.2d 750 (Ohio 1976) (application of some 400 public school regulations, many of which were not even followed by the public schools, to religious schools would have suffocated the schools' religious distinctives).

[679] *See* Attorney Gen. v. Bailey, 436 N.E.2d 130 (Mass. 1982). Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987) (church school reporting names, ages and attendance claimed to violate "Headship of Christ" as pertaining to church-school relationship and information should be secured directly from parents).

[680] *Fellowship Baptist Church*, *supra* note 679; Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 220 (N.D. 1982); State v. Faith Baptist Church of Louisville, 301 N.W.2d 571 (Neb. 1981); State v. Moorhead, 308 N.W.2d 60 (1981) (all cases upheld the application of teacher certification to religious schools).

[681] *Supra* note 680.

[682] *Id.* at 579.

Department of Education,[683] the court upheld application of teacher certification with the summary assessment that "to the extent that certification of teachers furthers education, it can be considered a compelling state interest."[684] However, upholding the application of state statutes or regulations to nonpublic schools based on the reasonableness of the statute or regulation[685] does not seem to be defining a compelling interest in the same way the *Yoder Court* did. The *Yoder Court* appeared to view compelling interests from the perspective of the final product or outcome of the educational process which would leave open optional methods.[686] Such inflexibility does not appear to accord free exercise of religion the full force of its fundamental constitutional right status by requiring that the government accomplish its interests by the least restrictive means.[687]

However, state inflexibility in examining state interests may be changing. In *People v. DeJonge*,[688] the Michigan Supreme Court, in holding that the application of the state's teacher certification requirement to home schooling violated parents' free exercise of religion, distinguished between the state's interest in education and the state's interest in enforcement of teacher certification:

> The state has focused upon the incorrect governmental interest. The state's interest is not ensuring that the goals of compulsory education are met, because the state does not contest that the DeJonges are succeeding at fulfilling such aims. Rather, the state's interest is simply the certification requirement of the pri-

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[683] *Supra* note 680.

[684] *Id.* at 381.

[685] *See also* Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983) (application of FLSA minimum wage provisions to church employees upheld); EEOC v. Fremont Christian Sch., 609 F. Supp. 344 (N.D. Cal. 1984), *aff'd* 781 F.2d 1362 (9th Cir. 1986); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (application of Title VII to religious schools upheld); Christ the King Regional High Sch. v. Culvert, 815 F.2d 219 (2d Cir. 1987); Kelley v. The Day Care Ctr., 451 A.2d 1106 (Vt. 1982) (application of state labor relations acts to nonpublic schools upheld); Braintree Baptist Temple v. Holbrook Pub. Sch., 616 F. Supp. 81 (D. Mass 1984); State v. Andrews, 651 P.2d 473 (Haw. 1982) (application of licensing or approval requirements to religious schools upheld); Damascus Community Church v. Clackamas County, 610 P.2d 273 (Ore. Ct. App. 1980) (application of zoning ordinance to church school upheld); Hough v. North Star Baptist Church, 312 N.W.2d 158 (Mich. Ct. App. 1981) (application of fire code to church school upheld).

[686] For example, alternative methods to teacher certification have been unpersuasive to courts. *See* Johnson v. Charles City Community Sch., 368 N.W.2d 74, 79 (Iowa 1985); Fellowship Baptist Church v. Benton, 815 F.2d at 494; Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d at 382; State v. Faith Baptist Church, 301 N.W.2d at 579 (student testing not satisfactory alternative to certification). *See also Fellowship Baptist Church*, 620 F. Supp. 308, 316 (D. Iowa 1985) (federal district court was unswayed by evidence that teacher certification is not an accurate predictor of teacher competency).

[687] *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

[688] 501 N.W.2d 127 (Mich. 1993).

> vate school act, not the general objectives of compulsory education. The interest the state pursues is the manner of education, not its goals.[689]

A second direction flowing from inadequate compelling interest guidelines from the Supreme Court is the resultant confusing disarray of decisions among the several states concerning application of state requirements to nonpublic schools. A brief review of past decisions indicates the variety of state interpretations. In *State ex rel. Nagle v. Olin*,[690] a state compulsory attendance requirement that students attend a school with a certified teacher was unreasonable as applied to a non-Amish child in an Amish school, whereas in *Fellowship Baptist Church v. Benton*,[691] a state statute exempting Amish schools from teacher certification requirements did not apply to a Baptist school. In *Bangor Baptist Church v. Maine*,[692] the Department of Education did not have express statutory authority in the compulsory attendance statute to impose direct sanctions against unapproved private schools, whereas in *State v. Faith Baptist Church*,[693] the enforcement of compulsory attendance statutes included the authority to enjoin operation of the school and to incarcerate the pastor.[694] In *Ohio v. Whisner*,[695] curriculum requirements regulating not only the courses to be offered but also the amount of instructional time to be allocated to the subjects offered were held to be unreasonable, whereas in *State v. Shaver*,[696] state department of education regulations specifying the courses to be offered were held to be reasonable. Finally, in *Kentucky State Board v. Rudasill*,[697] a Kentucky constitutional provision providing that no man shall "be compelled to send his child to any school to which he may be conscientiously opposed" prohibited Kentucky from requiring that any teacher in a nonpublic school be certified as well as from determining the basic texts to be used in private or parochial schools; but in *Care and Protection of Charles*,[698] a statutory provision whereby a Massachusetts school committee "shall not withhold such approval [to operate nonpublic school] an account of religious teaching"[699] did not exempt home instruction parents from the

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[689] *Id.* at 137.

[690] 415 N.E.2d 279 (Ohio 1980).

[691] 815 F.2d 485, 496-98 (8th Cir. 1987).

[692] 576 F. Supp. 1299 (D. Me. 1983). *See also* Vermont v. La Barge, 375 A.2d 121 (Vt. 1976) (state department of education exceeded legislative authority in requiring Holiness Methodist school to be approved).

[693] 301 N.W.2d 571 (Neb. 1981).

[694] Sileven v. Tesch, 326 N.W.2d 850 (Neb. 1982). *See also* State ex. rel. Kault v. North Platte Baptist Church, 365 N.W.2d 813 (Neb. 1985) (both church and pastor found guilty of contempt for refusal to cease operating a nonaccredited parochial school).

[695] 351 N.E.2d 750 (Ohio 1976).

[696] 294 N.W.2d 883 (N.D. 1980).

[697] 589 S.W.2d 877 (Ky. 1979).

[698] 504 N.E.2d 592 (Mass. 1987).

[699] *Id.* at 597.

obligation to furnish outlined curriculum, materials to be used, and qualifications of instructors. In *Ramona Convent of the Holy Names v. City of Alhambra*,[700] the city had no obligation under the free exercise clause to rezone a portion of the convent's property so that the convent could lease the property and acquire funds to repair its school, which had been damaged by an earthquake. "The City has no First Amendment obligation to rezone a portion of Ramona's property in order to ensure Ramona's solvency."[701]

Government and Fundamental Public Policy

Ever since the United States Supreme Court came forth with the concept of a fundamental or established public policy in *Bob Jones University v. United States*,[702] definition of what is meant by such a policy has been elusive. Part of the elusiveness involves determining how a fundamental or established public policy overlaps with the concept of a compelling interest. One way to view the overlay of the two concepts may be to understand that a fundamental or established public policy will always be a compelling interest, but a compelling interest will not necessarily rise to the level of a fundamental public policy.

In interpreting the free exercise or establishment clauses, courts frequently rule against a religious claimant without creating a fundamental or established public policy. Thus, courts can overrule religious claimants to protect government interests in a wide range of areas without needing to invoke or create a fundamental or established public policy.[703] Nor do courts need to raise fundamental public policy when ruling against religious educational institutions in matters of contract interpretation[704] or in application of

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[700] 26 Cal. Rptr. 140 (Cal. Ct. App. 1963).

[701] *Id.* at 148.

[702] 103 S. Ct. 2017 (1983).

[703] *E.g.*, *see* Hernandez v. Commissioner, 490 U.S. 680 (1989) (disallowance of contribution as charitable deduction for auditing and training services to Church of Scientology not violative of free exercise because even a substantial burden is justified by broad public interest in maintaining a sound tax system); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Indian objection to road building on government land for traditional Indian religious practices cannot prevail against government use of its own land); Bowen v. Roy, 476 U.S. 693, 707–708 (1986) (state termination of AFDC payments and food stamps on behalf of child for whom parents would not, on religious grounds, secure a social security number upheld as "reasonable means of promoting a legitimate public interest"); Goldman v. Weinberger, 475 U.S. 503 (1986) (military rules prohibiting headgear indoors not violative of free exercise as applied to yarmulke); United States v. Lee, 455 U.S. 252 (1982) (Amish employer's free exercise objection to payment of social security tax for work done by Amish employees on the ground that religion prohibits acceptance of government social payments offset by government interest in soundness of social security system).

[704] *E.g.*, *see* Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992) (jury award of $475,000 on behalf of two nuns against university upheld as result of contract termination, despite university's free exercise claim, where contracts had none of Canon Law or religious requirements alleged by university to have been the reasons for termination).

statutes to religious organizations where legislative intent indicates that the organizations were to be covered.[705] The terms fundamental or established public policy seem best reserved for governmental interest for which no exceptions can be permitted. Bob Jones University has become the paradigm for such an interest in eradicating race discrimination, but the important question is whether any other interest enjoys fundamental or established public policy status.

In *Bob Jones University*,[706] the Supreme Court upheld the IRS's revocation of the university's tax exempt status due to university rules prohibiting interracial dating and marriage. In so ruling, the court identified a long list of court decisions, executive orders, and legislative acts prohibiting racial discrimination[707] quantitatively amounting to what the court referred to as a "fundamental public policy."[708] Although the court identified its interest as "eradicating racial discrimination in education,"[709] a better statement of the government's interest would seem to be elimination of all legal support for racial discrimination, since Bob Jones University continues to operate with its discriminatory rules and without tax-exempt status. To date, no other government interest has presented the same pervasive legal efforts to address a form of discrimination, but post-*Bob Jones University* courts have flirted with the suggestion that elimination of discrimination on the basis of gender and sexual orientation might be candidates for fundamental public policy status.

In *Dayton Christian School v. Ohio Civil Rights Commission*,[710] a conflicting series of federal court decisions[711] left unclear the issue of whether

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[705] *E.g.*, *see* Soriano v. Xavier Univ., 687 F. Supp. 1188 (S.D. Ohio 1988) (ADEA applicable to Jesuit university over free exercise and entanglement claims because no evidence in statute that Congress intended to exclude religious educational institutions); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993) (ADEA applicable to religious high school because legislative intent was to make statute applicable on same basis as Title VII).

[706] 103 S. Ct. 2017 (1983). This case was actually a joinder of two separate cases from the Fourth U.S. Court of Appeals involving Bob Jones University and Goldsboro Christian Schools. Bob Jones University is a four-year, co-educational, fundamentalist religious institution that has also an elementary and secondary school on its campus. Goldsboro Christian schools operates elementary and secondary schools. Bob Jones University admitted blacks but barred interracial dating or marriage; Goldsboro refused to admit blacks. Both schools claimed biblical reasons for their discriminatory practices. Since the Supreme Court decision, Goldsboro has dropped its discriminatory policy.

[707] For the list, *see Id.* at 2029-30.

[708] *Id.* at 2033.

[709] *Id.* at 2029.

[710] 578 F. Supp. 1004 (S.D. Ohio 1004), *rev'd* 766 F.2d 932 (6th Cir. 1985), *remanded to state commission* 106 S. Ct. 2718 (1986).

[711] The district court found for plaintiff-nonrenewed pregnant teacher on the basis of the state's interest in eradicating gender discrimination and the court of appeals for the school because the state's intrusion into the religious practices of the school violated both the free exercise and establishment clauses. The Supreme Court invoked the abstention doctrine and declared that the district court should not have assumed jurisdiction while the Ohio Civil Rights Commission was investigating the alleged discriminatory contract nonrenewal.

the schools' religion-based policy requiring nonrenewal of a pregnant teacher's contract—because mothers were expected to stay at home with their preschool children—violated the state's Equal Employment Opportunity statute. Since the Ohio statute contained no religious exemption, the issue became whether an exemption was required by the free exercise and/or establishment clauses. Eventually, after remand by the Supreme Court to the Ohio Civil Rights Commission, the teacher-plaintiff withdrew her complaint and the charge of discrimination was dismissed for want of prosecution.[712] However, the district court decision, although vacated by the Supreme Court, nonetheless offers insight into how a fundamental public policy might be structured.

> The age and concomitant impressionability of the children attending [Dayton Christian Schools] probably render them more vulnerable to the influence of their environment than might be older students attending college. Exposure to an educational atmosphere wherein any form of unlawful discrimination is practiced would have a substantial impact on the values these children eventually carry out into the world when they leave school. Furthermore, the cumulative impact on the state's goal of ending discrimination could be significant if comparable religiously oriented schools and places of business likewise sought and were to receive exemptions from the prohibitions in [the Ohio statute].[713]

More recently, a federal district court in *Vigars v. Valley Christian Center of Dublin, California*[714] determined that dismissal of a teacher for out-of-wedlock pregnancy was not permitted under Title VII, although the school would have a First Amendment protected right to discharge the teacher for adultery. Because this case was remanded for trial regarding the reason for discharge, the court did not have to address the issue of a fundamental policy, but the court's discussion of the school's claims for exemption under Title VII's religious exemptions make interesting reading.

> That this case could involve sex discrimination is made even more clear when one realizes that only women can ever be fired for being pregnant without benefit of marriage. Thus, women would be subject to something that men would not be, and that is sex discrimination, regardless of the justification put forth for the reason for the disparity. The fact that [the school's] dislike of pregnancy outside of marriage stems from a religious belief may

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[712] Remarks by Dr. Clause E. Schindler, Superintendent of Dayton Christian Schools, October, 1986.

[713] *Dayton Christian*, 578 F. Supp. at 1036.

[714] 805 F. Supp. 802 (N.D. Cal. 1992).

> be relevant to the Court's First Amendment analysis, but it does not automatically exempt the termination decision from Title VII scrutiny.[715]

As tantalizing as these cases may seem to be in suggesting a fundamental public policy for gender discrimination, courts have not hesitated to provide First Amendment protection when employment decisions have involved ministerial functions.[716] Thus, at the present time, religious educational institutions may come under close judicial scrutiny concerning employment decisions, but there is no indication that courts are prepared to eliminate judicial protection for all gender discrimination on the basis of a fundamental public policy.

The same kind of judicial scrutiny suggested above for gender discrimination has also been reflected in the area of sexual orientation[717] in *Gay Rights Coalition v. Georgetown University*.[718] In this case, student gay and lesbian groups brought suit against a Jesuit university under a District of Columbia ordinance prohibiting discrimination in the use of or access to facilities and services based wholly or partially on the basis of sexual orientation.[719] Despite the university's religious opposition to homosexuality, the federal appeals court determined that providing facilities and services to gay and lesbian students would not require the university to change its beliefs[720] but would meet the District of Columbia's interest in "the eradication of sexual orientation discrimination."[721] Citing both *Bob Jones University* and *Roberts*

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[715] *Id.* at 808 (emphasis in original).

[716] *E.g.*, *see* Maguire v. Marquette Univ., 627 F. Supp. 1499, 1503 (E.D. Wis. 1986) (court could not inquire into hiring practices of Jesuit University as to whether female applicant's views on abortion were consistent with the university because "such an inquiry would require the university to immerse itself not only into the procedures and hiring practices of the theology department of a Catholic University but, further, into definitions of what it is to be a Catholic"). *See generally*, Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (sex discrimination charge in failure to hire female pastors barred by Title VII and free exercise clause because "the job of associate in pastoral care is so significant in the expression and realization of Seventh-Day Adventist beliefs.")

[717] For public sector cases, *see* Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988); Gay and Lesbian Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984) (recognition of gay/lesbian groups on public campuses required).

[718] 536 A.2d 1 (D.C. Cir. 1987).

[719] Ordinance is cited at *Id.* at 4, n.1.

[720] *Id.* at 25.

[721] *Id.* at 33.

v. *United State Jaycees*[722] as support for the principle that "government has a compelling interest in the eradication of other forms of discrimination,"[723] the appeals court concluded that "discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims."[724]

Despite the *Georgetown University* appeals court assertion that "nothing can penetrate the constitutional shield protecting against official coercion to remove a religious belief or to endorse a principle opposed to that belief,"[725] there is no assurance that recognition of the student groups would not eventually lead to the silencing of the expression of religious beliefs. For example, could Georgetown University preach and teach openly its opposition to homosexuality? Could the university include its belief on homosexuality as part of its doctrinal statement required to be signed by all faculty members? If so, could a faculty member be discharged for espousing views contrary to the doctrinal statement?[726] Would Bob Jones University have been able to teach that interracial dating and marriage were sinful and would result in some measure of spiritual judgment, assuming that they had eliminated the policies from their handbook?

One finds little comfort regarding the authorities cited by the *Georgetown University* court to support the inviolability of a person's beliefs.[727] The citations are inapposite either because they deal with the government's denial of a benefit based on belief[728] or because the authority, if taken at face value, would seem to contradict the conclusions in *Bob Jones University* and *Georgetown University*.[729]

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[722] 468 U.S. 609 (1984) (nonadmission of women as full members to Jaycees violated Minnesota's public accommodations statute).

[723] *Georgetown Univ.*, 536 A.2d at 38.

[724] *Id.*

[725] *Id.* at 25.

[726] *Cf.* National Gay Task Force v. Board of Educ. of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), *aff'd per curiam* 470 U.S. 903 (1985) (portion of state statute providing for punishment for mere advocacy of homosexual activities was unconstitutionally broad).

[727] 536 A.2d at 22-23.

[728] *E.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (expulsion of Jehovah's Witnesses for refusal to salute flag); Wisconsin v. Yoder, 406 U.S. 205 (1972) (truancy charges against Amish parents for refusal to send children past eighth grade); Wooley v. Maynard, 430 U.S. 705 (1977) (state refusal to issue license plate without words, "Live Free or Die").

[729] *E.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("The door of the First Amendment stands tightly closed against any government regulation of religious *beliefs* as such . . . . Government may neither compel affirmance of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold views abhorrent to the authorities") (emphasis in original).

What courts appear to overlook is that a statement of belief is of little effect if the religious organization cannot enforce those beliefs on those in the organization.[730] The enforcement function which a religious organization must have to protect the verity and purity of its belief system is the very function undercut by the emerging fundamental public policies. To penalize an organization's enforcement of its religious belief system, however much a court may disagree with it, is to threaten the very purpose and vitality of such voluntary organizations. At the very least, religious organizations would have only the basic rights of any voluntary association,[731] and, at the very worst, the most religiously militant belief systems will be compelled to adjust themselves so that those who believe the most will have to accommodate those who believe the least.

[730] *See* L. Buzzard and T. Brandon, Jr. Church Discipline and the Courts (1986) where churches have been increasingly subjected to litigation as a result of trying to enforce their

CHAPTER V

FEDERAL ANTI-DISCRIMINATION LEGISLATION

Introduction

Federal anti-discrimination legislation can basically be divided into three categories: that which imposes requirements only if the private school receives federal assistance; that which applies simply because the private school is an employer; and that which provides targeted public funds which may be available to private or parochial school students. The major anti-discrimination statutes in the first category are the Rehabilitation Act of 1973 as amended in 1974,[732] Titles VI[733] and IX[734] of the Civil Rights Act, and the Age Discrimination Act of 1975.[735] The second category includes Title VII[736] of the Civil Rights Act, the Age Discrimination in Employment Act of 1967,[737] the Equal Pay Act of 1963,[738] the Americans With Disabilities Act of 1990,[739] and the Family and Medical Leave Act.[740] The third category is the Individuals with Disabilities Education Act (IDEA, formerly EHA).[741] Although state statutes are not discussed in this section, those making employment decisions in nonpublic schools need to be aware that state or nondiscrimination laws may be applicable to factual patterns which could also arise at the federal level,[742] and could apply to areas of discrimination

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[732] 20 U.S.C. § 794.
[733] 42 U.S.C. § 2000d.
[734] 20 U.S.C. § 1681-86.
[735] 42 U.S.C. § 6101.
[736] 42 U.S.C. § 2000e.
[737] 29 U.S.C. § 621-34.
[738] 29 U.S.C. § 206.
[739] 29 U.S.C. § 706; 42 U.S.C. §§ 12101 *et seq.*
[740] 29 U.S.C. §§ 2601-2654.
[741] The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 602 applies only to recipients of federal assistance operating a public elementary or secondary education program. However, IDEA provides benefits to all children in a public school district, including those enrolled in private or parochial schools.
[742] *E.g.*, *see* University of Md. at Baltimore v. Boyd, 612 A.2d 305 (Md. Ct. App. 1992) (university police officer's skin condition, pseudofolliculitis barbae (PFB), was a handicap under state human relations statute with severely scarred face creating externally visible disfigurement, which unless the officer wore a beard impaired his ability to socialize, in part because the skin condition affected primarily Afro-American males, as well as meeting definition of disability, university's policy of having officers be clean shaven was outweighed by policy's discriminatory impact).

not covered at the federal level.[743] Discrimination enforcement involving institutions receiving federal financial assistance has been significantly affected by the Civil Rights Restoration Act of 1987.

General Corrective Statutes

Civil Rights Restoration Act of 1987[744]

This act of Congress reversed the United States Supreme Court's decision in *Grove City College v. Bell*[745] that a "program or activity" receiving financial assistance was to be interpreted in a specific rather than an institution-wide manner. The Restoration Act provides in part that:

> [T]he term "program or activity" and "program" mean all of the operations of . . .
>
> (2)(A) A college, university, or other postsecondary institution, or a public system of higher education . . .
>
> (3)(A) an entire corporation, partnership or other private organization, or an entire sole proprietorship
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or . . .
>
> any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681[746] of this title to such operation would not be consistent with the religious tenets of such organization.

Prior to the Restoration Act, alleged discrimination in programs not receiving federal financial assistance, especially athletics, could be investigated only under state constitutional provisions prohibiting discrimination based on gender or under state ERA statutes.[747]

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[743] *See* River Bend Community Unit Sch. Dist. v. Human Rights Comm'n, 597 N.E.2d 842 (Ill. App. Ct. 1992) (state statute prohibited discrimination on basis of marital status); Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (district ordinance prohibiting discrimination in providing services on basis of sexual orientation applied to religious university).

[744] 20 U.S.C. § 1687.

[745] 104 S. Ct. 1211 (1984). Because the only federal financial assistance received by Grove City College was student financial aid, "the program-specific requirements of Title IX" meant that the Department of Education's enforcement authority extended only to "the College's financial aid program." *Id.* at 1222.

[746] Section 1681 is the same as Title IX which prohibits discrimination based on sex.

[747] *See generally, Blair v. Washington State Univ.: Making ERAs A Potent Remedy for Sex Discrimination in Athletics*, 14 J.C.U.L. 575 (1988).

Religious Freedom Restoration Act of 1993[748]

This Act, signed by President Clinton on November 16, 1993, purports to restore the compelling interest test set forth in *Wisconsin v. Yoder*[749] and Sherbert v. Verner[750] which had been virtually eliminated by *Employment Division v. Smith*.[751] The Act provides that:

> [g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [except that] [g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling interest; and (2) is the least restrictive means of furthering that compelling interest.[752]

The critical operative term seems to be "substantially burden" which the statute does not define and which the Supreme Court did not use in *Yoder*. Since the "substantially burden" standard is only "a claim or defense to persons whose religious exercise is substantially burdened,"[753] a person who cannot demonstrate the level of burden specified in the statute would presumably be subject to the *Smith* standard of neutral and general applicability of laws which would override free exercise claims.[754] Whether "substantially burden" will take its definition from the unique facts of *Yoder*, where continuity and existence of the Amish community was threatened by the possible incursion of secular ideas, remains to be seen. If so, most persons or organizations will not benefit from this statute. With isolated exceptions such as the Amish, religious beliefs may oppose whatever government act is being imposed, but religious practices generally will not experience the same degree of impairment faced in *Yoder*.[755]

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[748] 42 U.S.C. §§ 2000bb-2000bb-4.

[749] 406 U.S. 205 (1972).

[750] 374 U.S. 398 (1963).

[751] 494 U.S. 872 (1990). *See* Mawdsley, *Has Wisconsin v. Yoder Been Reversed? Analysis of Employment Division v. Smith*, 63 EDUC. L. REP. 11 (1991).

[752] 42 U.S.C. § 2000bb-2(b)(3)(a) and (b).

[753] 42 U.S.C. § 2000bb-2(b)(2).

[754] *See* Mawdsley, *Employment Division v. Smith Revisited: The Construction of Free Exercise Rights Under the United States Constitution*, 76 EDUC. L. REP. 1 (1993).

[755] One clear example decided under the *Smith* standard which would most certainly remain unchanged by the Religious Freedom Restoration Act would be government action that seems to be directed at one particular religion. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993) (city ordinances ostensibly prohibiting killing of animals held to be non-neutral violations of Free Exercise Clause because the ordinances' exceptions permitting killing of animals revealed the ordinances were directed solely at the Santeria religion's practice of animal sacrifices).

Statutes Based on Federal Assistance

Rehabilitation Act of 1973 (as amended in 1974) (Sec. 504)

Section 504 of the Rehabilitation Act, as amended, provides that,

> no otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This Act protects a person with a handicap (hereafter, referred to as "disability"), defined as a "person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, (iii) is regarded as having such an impairment."[736] Included among the disabilities covered by the Act is "any physiological disorder or condition, cosmetic disfigurement or anatomical loss" as well as "any mental or psychological disorder."[737] Also included within the act's protection are "alcoholism and drug abusers who are reformed or rehabilitated" but not "individuals whose current use of alcohol or drugs prevents them from performing their job or who are a direct threat to the safety of persons or property . . . ."[738] The meaning of the word, "solely," in the statute is somewhat ambiguous as to whether a mixed motive by a decisionmaker (nondiscriminatory reason in addition to a reason based on disability) would constitute a violation of section 504.[739]

Prior to passage of the Americans With Disabilities Act (ADA), section 504 was the only remedy available to nonpublic students and employees with disabilities since IDEA applies only to public elementary and secondary schools.[740] For nonpublic educational institutions receiving federal financial assistance, the exclusion of students from programs or the discipline of students is significantly affected. The current judicial standard regarding disci-

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[736] 29 U.S.C. § 706(8)(B). *See* Byrne v. Board of Educ., Sch. of West Allis-West Milwaukee, 979 F.2d 560 (7th Cir. 1992) (single hospital stay for allergy tests did not create "record of impairment" for purpose of bringing person within statute).

[737] 34 C.F.R. § 104.3(j).

[738] 34 C.F.R. § 104.3 (l)(A) and (B).

[739] *See* Wood v. President and Trustees of Spring Hill College of Mobile, 978 F.2d 1214 (11th Cir. 1992) (without resolving the issue of mixed motive, the court suggests that "solely" cannot be changed to mean "a significant factor").

[740] In Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court determined in public schools that EHA [IDEA] is an exclusive remedy as compared to section 504. But to the extent that IDEA rights or remedies are inadequate, (or unavailable as in nonpublic schools) section 504 is apparently still available. *See* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979); Community High Sch. Dist. v. Denz, 463 N.E.2d 998 (Ill. 1984). The Supreme Court in *Smith* had also ruled that attorney fees were not available under EHA [IDEA] but the Handicapped Children's Protection Act (HCPA) was enacted as an amendment to EHA to overrule *Smith*. 20 U.S.C. §§ 1415(e)(4)(B)-(F).

pline is that a student can be disciplined for misconduct only to the extent that the misconduct is not attributable to his disability and is within the student's control.[761]

But while section 504 prohibits discrimination on the basis of disability, it does not require affirmative obligations.[762] Thus an "otherwise qualified" person cannot be excluded from benefits solely because of his or her disability, but a school is not required to devote extra resources to those with disabilities.[763] The leading case continues to be *Southeastern Community College v. Davis*,[764] where the United States Supreme Court upheld the denial of admission of a student with a serious hearing disability into a nursing program and ruled that an otherwise qualified applicant is one who can meet the requirements of the job represented by the training in spite of her disability. The regulations reinforce this principle by not requiring schools to modify academic programs where academic requirements "are essential to the program of instruction being pursued . . . or to any directly related licensing requirement . . .."[765] In *Doe v. New York University*,[766] the university did not have to grant readmission to a woman with a long history of recurring borderline disorders. Two students, each with vision in only one eye, could be denied participation in contact sports based upon medical testimony that they were not "otherwise qualified."[767] In *Barnes v. Converse College*,[768] the college was required to furnish an interpreter at the school's expense after a hearing impaired teacher was admitted as a student to its

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[761] *See* S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982). For the IDEA standard see Honig v. Doe, 108 S. Ct. 592 (1988) (student whose disruptive behavior included stealing, extorting money from fellow students and making sexual comments to female classmates could not be expelled).

[762] *See* Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993) (hearing officer may award special education to an "otherwise qualified handicapped" child under section 504, but only if declining to do so would be discriminatory).

[763] *See* Parks v. Pavkovic, 753 F.2d 1397, 1408 (7th Cir. 1985).

[764] 442 U.S. 397 (1979).

[765] 34 C.F.R. § 104.12. *See* Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992) *cert. denied* 113 S. Ct. (1992) (medical school that had weighed request of student with cognitive deficits to have alternative form of multiple-choice test for biochemistry exam did not have to provide alternative exam where any alternative would result in substantial program alterations, result in lowering academic standards, and devalue school's end product).

[766] 666 F.2d 761 (2d Cir. 1981). *See also* Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987) (refusal of college to waive clinical proficiency requirements for student with visual and neurological condition held reasonable).

[767] Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).

[768] 436 F. Supp. 635 (D.S.C. 1977).

summer program. However, another school[769] did not have to provide a deaf interpreter where the hearing impaired student was passing courses with the assistance provided by the school[770] and was advancing from grade to grade. Schools receiving federal assistance are not prohibited from operating separate, comparable classes for those with disabilities but they also cannot require the disabled to attend those classes unless education in a traditional setting cannot be accomplished satisfactorily.[771] Institutions are not required to make each facility available to the disabled as long as "the program or activity, when viewed in its entirety, is readily accessible to persons with disabilities."[772] Nonpublic elementary and secondary schools are prohibited from charging more for providing an appropriate education to the disabled "except to the extent that any additional charge is justified by a substantial increase in cost to the recipient."[773] Services which are considered to increase costs are other than supplementary aids and services provided in the regular school environment.[774]

For a student with a disability, educational institutions must make reasonable accommodations to academic requirements in much the same way that employers do. However, reasonable accommodation will not be an issue if the student has not made a demand for such accommodation.[775]

The Rehabilitation Act prohibits discrimination at all phases of employment, including recruiting, screening, hiring, classification, working conditions, promotions, and discharge.[776] Employers are required to make "reasonable accommodation"[777] to the disability unless the accommodation would constitute an "undue hardship."[778] Although "reasonable accommodation" does not require employers to undertake affirmative action, as is required for students under IDEA, the line of distinction can be blurred.[779] Section 504 does seem to treat as suspect any presumptive or automatic dis-

[769] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 102 S. Ct. 3034 (1982).

[770] The school under EHA [IDEA] was providing the use of an FM hearing aid, a tutor one hour each day and a speech therapist three hours each week. *Id.* at 3049.

[771] 34 C.F.R. § 104.4 (b) (3).

[772] 34 C.F.R. § 104.22 (a).

[773] 34 C.F.R. § 104.39 (b).

[774] 34 C.F.R. § 104.34a.

[775] *See* Wood v. President and Trustees of Spring Hill College of Mobile, 978 F.2d 1214 (11th Cir. 1992).

[776] 34 C.F.R. § 22 104.11(b).

[777] Reasonable accommodation may require such actions as acquiring or modifying equipment, making necessary facilities accessible or usable (e.g. use of ramps or adjusting height of work areas), restructuring work schedules or providing readers or interpreters. 34 C.F.R. § 104.12 (b).

[778] Undue hardship requires evaluation of a number of factors such as nature and cost of accommodation, size of budget, size of the program, number of employees, and type of facilities and operation. 34 C.F.R. § 104.12 (c). *See* Wood v. Omaha Sch. Dist., 985 D.2d 437 (8th Cir. 1993) (burden is on employer to prove that accommodation is not reasonable).

[779] *Compare* Southeastern Community College v. Davis, *supra* note 764 (provision of lip-reader not required by section 504) *with* Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) (hearing aid may have to be provided for applicant for school bus driver's license).

qualification of any particular class of disability.[780] What is required appears to be some evidence that the disability cannot be accommodated to perform the job function.[781] In *Cain v. Archdiocese of Kansas City*,[782] a parochial school teacher had a private cause of action under section 504 when her contract was terminated prior to the beginning of the school year because of a mild case of epilepsy, which the teacher said could be easily controlled with dilantin. In *Pushkin v. Regents of the University of Colorado*,[783] a medical doctor with multiple sclerosis had been wrongly denied admission to the university's psychiatric residency program.

In a case that may have major repercussions in teacher education, a teacher who alleged disability discrimination against the Virginia Board of Education for failure to waive a portion of the NTE for certification purposes was entitled to a jury trial under the Seventh Amendment.[784] The court considered plaintiff's request for monetary relief, including backpay, to constitute damages, instead of equitable relief, for which a jury trial is required.[785] In this case, the teacher's contract was terminated because she had not passed all parts of the NTE.

In light of the prior discussion, a student or employee's prima facie case under section 504 requires a showing that he or she is an *otherwise qualified* person apart from the handicap, as well as an offering of proof from which it can be inferred that the rejection was based solely on his or her handicap. The institution must then present evidence that the student or employee was not an otherwise qualified person—that is, someone qualified in spite of the handicap. The employee or student then must present evidence that the institution's reasons are based on misconceptions or are pretextual. Damages are available to a plaintiff only in cases of intentional discrimination.[786]

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[780] See Gurmakin v. Constanzo, 556 F.2d 184 (3d Cir. 1977) (court disapproval of presumptive disqualification of blind person from consideration as a teacher); Jackson v. State, 544 A.2d 291 (Me. 1988) (Court overturned automatic revocation of bus driver's license because he had diabetes).

[781] See Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979) (court upheld refusal to hire blind administrator who lacked qualifications to supervise others).

[782] 508 F. Supp. 1021 (D. Kan. 1981).

[783] 658 F.2d 1372 (10th Cir. 1981).

[784] The Seventh Amendment provides in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved . . . ."

[785] Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994).

[786] See Wood v. President and Trustees of Spring Hill College in Mobile, 978 F.2d 1214 (11th Cir. 1992) (damages not available to schizophrenic student who withdrew from College where student was not able to prove intentional discrimination).

Title VI

Title VI provides that,

> no person in the United States shall, on the ground of race, color or national origin, be excluded form participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[787]

Title VI contains no exemption for religious practices and, indeed, after *Bob Jones University v. United States*,[788] it is clear that any form of racial discrimination, even if for religious reasons, will disqualify an institution from any form of government support. Federal financial assistance under Title VI includes any source of assistance, not just from the Department of Education.[789] The right of individuals to pursue a private cause of action under Title VI has become increasingly confusing.[790] Title VI applies to national origin minority students. Although proof of discriminatory impact was all that was required in *Lau v. Nichols*,[791] the current interpretation appears to require a discriminatory purpose.[792]

Title IX

Title IX provides that,

> no person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance.[793]

Title IX generally prohibits any discrimination in employment standards or selection in benefits for employees.[794] In a much-publicized but unreported case, an unmarried, pregnant religious college teacher who had been terminated was awarded $45,000 in an out-of-court settlement of a Title IX complaint when she alleged that she could prove that adulterous affairs com-

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[787] 42 U.S.C. § 2000d. "Race, color, or national origin" does not include Appalachian and low income persons. Bronson v. Board of Educ., 550 F. Supp. 941 (D. Ohio 1982).

[788] 103 S. Ct. 2017 (1983).

[789] Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (V.A. benefits).

[790] Private cause of action exists. Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983); Lujan v. Franklin County Bd. of Educ., 766 F.2d 917 (6th Cir. 1985); University of Cal. v. Bakke, 438 U.S. 265 (1978). Private cause of action does not exist. Guardians Ass'n v. Civil Serv. Comm'n., 463 U.S. 582 (1983); Chowdhury v. Reading Hosp. and Medical Ctr., 677 F.2d 317 (3d Cir. 1982).

[791] 414 U.S. 563 (1974) (Chinese students had claim under Title VI to require instruction that included the teaching of English).

[792] University of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (Title VI coextensive with equal protection); Washington v. Davis, 426 U.S. 229 (1976) (discriminatory purpose required for equal protection).

[793] 20 U.S.C. § 1681-86.

[794] North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (teacher sex discrimination); Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (11th Cir. 1982) (out of wedlock pregnancy).

mitted by male faculty did not result in termination.[795]

Title IX expressly excludes admissions to all educational institutions, except institutions of vocational education, professional education, graduate higher education and public institutions of undergraduate higher education.[796] The Title IX regulations purport to bar sex discrimination in all admissions standards.[797] However, the regulations do permit certain kinds of discrimination, such as separate but comparable toilet, locker room and shower facilities,[798] separation by sex within physical education classes involving bodily contact sports,[799] continued existence of educational institutions admitting only one sex,[800] and an exemption for "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the tenets of such organization."[801] The religious exemption must be claimed in a written request to the director of the Office for Civil Rights of the Department of Education, and it must identify which parts of the regulations conflict "with a specific tenet of the religious organization."[802] Title IX no longer applies to discriminatory dress codes, primarily because of judicial reluctance to enforce Title IX regulations.[803]

Title IX has become a favorite vehicle to challenge elimination of women's athletic programs[804] or to refuse to permit participation in sports on

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[795] Landphair v. Lynchburg College, No. 79-0003-L (D. Del. 1980).

[796] 20 U.S.C. § 1681 (a)(1).

[797] 45 C.F.R. § 86. *See also* O'Connor v. Board of Educ. of Sch. Dist. 23, 545 F. Supp. 376 (D. Ill. 1982) (regulations did not entitle eleven-year-old girls to try out for boys' basketball team); Forte v. Board of Educ., N. Babylon Union Free Sch. Dist., 431 N.Y.S.2d 321 (N.Y. App. Div. 1980) (prohibition of boys on girls' volleyball team not violative of Title IX).

[798] 45 C.F.R. § 86.33.

[799] 45 C.F.R. § 86.34. The definition of a contact sport is unclear. *Compare* Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (sex segregation in tennis upheld) *with* Brendon v. Minnesota State High Sch. League, 477 F.2d 1292 (8th Cir. 1973) (sex segregation in tennis, cross-country skiing and running rejected).

[800] 45 C.F.R. § 86.16. *See also* Naranja v. Alverno College, 487 F. Supp. 635 (D. Wis. 1980) (private woman's college not an institution of "professional education" bringing it under Title IX); Garrett v. Board of Educ. of Sch. Dist. of Detroit, 775 F. Supp. 1004 (E.D. Mich. 1991) (Title IX does not authorize establishment of new single sex schools for black males).

[801] 45 C.F.R. § 86.12 (a).

[802] 45 C.F.R. § 86.12 (b).

[803] 16 NOLPE NOTES 4 (Sept. 1981). *See* Trent v. Perritt, 391 F. Supp. 171 (D. Miss. 1975) (grooming code which prohibited only male students from wearing hair below the ear lobe or over the collar did not constitute sex based discrimination).

[804] Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (preliminary injunction ordering university to reinstate women gymnastic and volleyball teams to team status upheld; women were able to prove that disparity between gender composition of student body and its athletic program created an under-represented gender and that the under-represented gender had not been "fully and effectively accommodated by the present program," 44 Fed. Reg. 71,418 (1979); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (11th Cir. 1993) (in discontinuance of women's fast pitch softball, plaintiffs had to produce evidence that termination of program was not only not substantially proportionate to relationship between female enrollment and athletic participation, but also that institution did not fully and effectively accommodate interests and abilities of women athletes).

the basis of gender.[805] A violation of Title IX does not require specific intent by the educational institution to discriminate against women.[806] In *Cook v. Colgate University*,[807] the university's refusal to grant varsity status to the women's ice hockey team was considered to be pretextual, and even though financial concerns by the university were not pretextual, such concerns did not excuse liability under Title IX.

Early confusion as to whether Title IX permitted a private cause of action[808] has been resolved in *Franklin v. Gwinnett County Public Schools*,[809] where private cause of action for damages was upheld by the Supreme Court. Although prior Title IX interpretation appeared to follow Title VI in requiring discriminatory intent,[810] proof of discriminatory intent is no longer required to prove a violation of Title IX.[811]

In the wake of *Franklin v. Gwinnett County Public Schools*, Title IX will become a significant vehicle to address sexual harassment in schools by both employees and by other students. As suggested in the employment cases, stating a cause of action for quid pro quo harassment may be less difficult than one for hostile environment. Quid pro quo, as the term denotes, involves the exchange of sexual favors for some form of benefit, or it may involve some economic loss suffered by the plaintiff as a result of refusing the sexual advances.[812] A cause of action under Title VII can be supported by one or more acts.[813] However, although quid pro quo may be applicable to some student situations (such as the exchange of sexual favors for grades or the assignation of a lower grade for refusal to accede to a request for sex),

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[805] Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168 (3d Cir. 1993) (denial of male to participate on female field hockey team may violate Title IX if field hockey is not "a contact sport" and if male athletic opportunities had "previously been limited" 34 C.F.R. § 106.41(b); in this case, female students were permitted to try out for all twenty-two high school athletic teams while male students were permitted to try out for only twelve).

[806] Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (6th Cir. 1993).

[807] 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated* 992 F.2d 17 (2d Cir. 1992).

[808] Cannon v. University of Chicago, 441 U.S. 677 (1979) (private remedy exists); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979) (no private cause of action).

[809] 112 S. Ct. 1028 (1992).

[810] *Cf.* University of Cal. v. Bakke, 438 U.S. 265 (1978) (discriminatory intent required for Title VI) *with* Cannon v. University of Chicago, No. 80-1763 (7th Cir. 1981) (discriminatory intent required for Title IX).

[811] Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied* 114 S. Ct. 580 (1993) (student alleges sexual molestation by school employee); Sharif v. New York State Educ. Dep't, 709 F. Supp. 345 (S.D.N.Y. 1989) (state use of SAT test only to determine eligibility for state scholarships). However, Title IX applies only to intentional violations and cannot be used where a violation appears to be grounded in negligence. Houston v. Mile High Adventist Academy, 846 F. Supp. 1449 (D. Colo. 1994).

[812] *See* Karibian v. Columbia Univ., 812 F. Supp. 413 (S.D.N.Y. 1993) (plaintiff failed to state quid pro quo charge where she had been promoted and her salary increased despite allegedly refusing sexual harassment).

[813] *See* Comeau v. Board of Educ. of Ballston Spa, 554 N.Y.S.2d 359 (N.Y. App. Div. 1990) (patting female employee on buttocks on almost daily basis warranted dismissal).

student sexual harassment will most likely fall into the hostile environment category.

A hostile environment will depend upon whether the conduct was unwelcome, whether the conduct was severe or pervasive, and whether the person bringing the complaint, based on his or her own conduct, dress, and language, could reasonably have been offended by the harassing conduct. In *Patricia H. v. Berkeley Unified High School*,[814] whether continued presence in the school district of a teacher who had sexually molested plaintiff and whether complaints and requests for assistance from the school district went unheeded were questions for the jury. Sexual harassment of students by school employees would clearly permit student recovery of damages against the abuser, but the student may have difficulty recovering against the school district unless the school administrators knew or should have known about the harassment.[815]

In *Doe v. Petaluma City School District*,[816] an equally significant issue for students involving peer sexual harassment arose. In *Petaluma*, a girl who had been repeatedly called such terms as "hot dog bitch" and "slut" throughout seventh and eighth grades so that she finally had to transfer to a private school had no Title IX cause of action against the school district or school officials because she was held to a standard of intentional discrimination. It was not enough to prove that school officials knew or should have known of a hostile environment caused by peer sexual harassment. An allegation that the school district failed to end sexual harassment by other students was not sufficient to state a sexual harassment claim under Title IX against the school district. The *Petaluma* court refused to find that compulsory attendance created a special relationship between the student and the school district for purposes of imposing a constitutionally required duty to prevent peer harassment.

Whether Title IX will follow recent Section 1983 litigation in finding school administrators liable for their action or inaction in demonstrating deliberate indifference to the right of a student's Fourteenth Amendment right to be free from sexual abuse by a teacher remains to be seen. In *Doe v. Taylor Independent School District*,[817] supervisory liability was possible but would entail a showing by the plaintiff-student that school officials had learned of a pattern of inappropriate peer behavior and demonstrated deliberate indifference by failing to act. Like Title IX, liability under Section 1983

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[814] 830 F. Supp. 1288 (N.D. Cal. 1993).

[815] *See* Stoneking v. Bradford Area Sch. Dist., 856 F.2d 594 (3d Cir. 1988) (school officials who had discouraged female student from complaining about sexual conduct of band director not entitled to qualified immunity).

[816] 830 F. Supp. 1560 (N.D. Cal. 1993).

[817] 15 F.3d 443 (5th Cir. 1994).

has not been predicated yet on a special relationship between the harassed or molested student and the school.[818] However, under the current status of the law, Title IX and Section 1983 are not equally applicable to all educational institutions. Title IX will be applicable only to nonpublic educational institutions that receive assistance administered by the U.S. Department of Education[819] but Section 1983 would not be applicable to nonpublic schools at all unless there has been "state action."

Age Discrimination Act of 1975

This act prohibits "unreasonable discrimination on the basis of age in programs or activities receiving Federal financial assistance."[820] Specifically excluded from coverage is "differentiation . . . based upon reasonable factors other than age."[821] This act applies to persons forty and older but there is conflicting authority as to whether the act creates a private cause of action.[822] This act has very little litigation history and the Civil Rights Restoration Act of 1986 does not seem to have increased its use.[823] The regulations indicate that any age limit on admissions of students, which favors younger over older applicants and which would not be necessary to the institution's normal operations, would violate the act.[824] However, a practice that benefits older persons over younger persons may also violate the act on a reverse discrimination theory.[825] A student age discrimination claim concerning student academic discipline must have a rational basis and inferences as to age discrimination will not be drawn where facts indicate that the discipline was not arbitrary or capricious.[826]

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[818] *See* C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179 (E.D. Pa. 1993) (harassment by other students); Elliott v. New Miami Bd. of Educ., 799 F. Supp. 818 (S.D. Ohio 1992) (alleged sexual, physical and verbal abuse by teacher).

[819] *E.g.*, *see* Houston v. Mile High Adventist Academy, 846 F. Supp. 1449 (D. Colo. 1994) (Title IX did not apply to religious school where no proof school received federal financial assistance).

[820] 42 U.S.C. § 6102.

[821] 42 U.S.C. § 6103(b)(1)(B).

[822] Ramels v. Hargrove, 731 F. Supp. 1214 (E.D. Pa. 1990) (private cause of action exists); Mittelstaedt v. Board of Trustees of Univ. of Ark., 487 F. Supp. 960 (D. Ark. 1980) (no private cause of action).

[823] *See* Stephanidis v. Yale Univ., 652 F. Supp. 110 (D. Conn. 1986), *aff'd* 814 F.2d 654 (2d Cir. 1987) (student's application of admission not covered by act because university English Department was not recipient of federal assistance).

[824] 45 C.F.R. § 90.15 ("An action may be based on a factor other than age [which has a disproportionate effect on persons of different ages] only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.").

[825] *See Ramels*, *supra* note 822 (bank practice of granting additional 1/4% interest on CDs to depositors over age 50 stated age discrimination claim).

[826] *See* Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382 (Ill. App. Ct. 1993) (40-year-old dental school student dismissed for poor academic performance failed to establish that a younger student's grade was to high or that Australian professors had formed a conspiracy to fail him in his clinical courses).

Even though seldom litigated, the act does raise interesting questions concerning reentry of persons (particularly women) into academic institutions, especially those of higher education, after a lapse of years (very frequently to raise children).[827] Very often the reentering person will be forty or older, thus bringing the act into play. Most of the reentry problems faced would not be cognizable under the 1975 act because institutional rules tend to be facially neutral and because they lack an intent to discriminate against persons over forty. But some of the unique problems face by reentry persons include:

(1) Letters of recommendation required from schools not attended for years, or which may no longer exist;

(2) Changes in prerequisite courses which tend to increase the number of hours needed for program completions;

(3) Grade inflation in comparing acceptable G.P.A.'s from the time of first admission to reentry;

(4) G.R.E. scores considered valid for only a limited number of years (usually five to ten);

(5) Limitations on available financial aid because of a spouses's higher income, as compared to younger independent students;

(7) Part-time student problems such as financial aid limited to full-time students, class schedules where few required courses are available evenings or weekends, faculty advisors not available evenings or weekends, and absence of child care.[828]

In a competitive marketplace for students, especially in higher education, nonpublic colleges may want to reevaluate rules, policies or practices which discourage reentry students, including lack of auxiliary support child-care services.

Statutes Not Based on Federal Assistance

Title VII

Title VII, unquestionably the workhorse of federal employment anti-discrimination legislation, prohibits employment practices that discriminate in hiring, discharge, or classification based on race, color, religion, sex, or

[827] Excellent materials regarding the re-entry of women are available from Project on the Status and Education of Women, Association of American Colleges, 1818 R. St. N.W., Washington, D.C. 20009. The basic publication is entitled "Barriers to Re-Entry Women – College Transfer Policies, Residency and Graduation Requirements."

[828] A decision by a college not to fund a child care service for women attending classes was held to support a Title IX cause of action. De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1975).

national origin.[829] Sex discrimination applies only to biological gender, not sexual orientation.[830] Title VII can apply in a very expansive sense to the employment relationship so that discrimination can be found where a school chooses an insurance company which discriminates under Title VII to handle its annuity program.[831] In addition, a Title VII cause of action is viable where "the [work] environment would reasonably be perceived, and is perceived, as hostile and injurious [with] no need for it also to be psychologically injurious."[832] A Title VII complaint must be filed within 300 days of the alleged discriminatory act, or if continuing violations are alleged, the complaint must be filed within 300 days of the last of "a number of discriminatory acts emanating from the same discriminatory animus, each act constituting a separate wrong."[833]

Title VII has a number of important exemptions that will affect some nonpublic schools:

(1) The act does not apply to employers with fewer than fifteen employees.[834] Since church employees are not excluded, church schools, where the church is considered the employer, would need to count all church and school employees.

(2) The act exempts hiring, discharge or classification based on religion, sex, or national origin where "religion, sex or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the operations of that particular business or enterprise."[835] The burden is on the employer to prove the necessity of the BFOQ. The BFOQ must be of the nature that the essence of the business would be undermined if the BFOQ exemption were not granted,[836] but the BFOQ cannot be based

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[829] 42 U.S.C. § 2000e-2(a).

[830] Smith v. Liberty Mutual Life Ins. Co., 569 F.2d 325 (5th Cir. 1978) (effeminate male not protected); Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (self-announced lesbian not protected).

[831] Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).

[832] Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993) (although decided under a gender discrimination set of facts, presumably all areas under Title VII would be protected from abusive treatment, e.g., hostile or abusive treatment of an employee based on religion).

[833] Kassaye v. Bryant College, 999 F.2d 603, 606 (1st Cir. 1993) (dismissal of complaint of faculty member denied tenure upheld where Title VII complaint not filed within 300 days; only act within the 300 days was college's request that plaintiff vacate his office 30 days early for a new faculty member, but that request was not discriminatory so did not become part of plaintiff's alleged serial violation).

[834] 42 U.S.C. § 2000e(b).

[835] 42 U.S.C. § 2000e-2(e)(1).

[836] Fernandez v. Wynn Oil Co., 653 F.2d 273 (9th Cir. 1981) (undermining not proved by allegation that South American clients would refuse to deal with female director of international operations).

on stereotyping.[537] In *Vigars v. Valley Christian Center of Dublin, California*,[538] where discharge of a librarian on the basis of an out-of-wedlock pregnancy was considered to be in violation of Title VII, a BFOQ in terms of being a role model in a religious school could not be determined by the preferences of fellow employees or customers. The Equal Employment Opportunity Commission (EEOC) narrowly interprets BFOQ especially as it relates to job qualifications. Qualifications such as educational background, practical training, and physical and mental health will be examined closely in a lawsuit,[539] but particularly suspect will be minimum test scores based on tests which are culturally biased on qualifications unrelated to the job.[540] Religious qualifications tend to receive favorable judicial treatment as they apply to hiring or discharge,[541] but courts look less favorably on claims of religious qualifications which appear to treat women on a different basis from men,[542] have

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[537] *See* Hernandez v. St. Thomas Univ., 793 F. Supp. 214 (D. Minn. 1992) (university had burden of proving a factual basis of privacy considerations of BFOQ for hiring only female custodians for female dorms); Capaci v. Katz and Besthoff, Ind., 720 F.2d 1291 (5th Cir. 1983) (advertising for manager trainee in male wanted columns on sincere belief that women would not be interested violates Title VII). *See also*, 29 C.F.R. § 1625.4 which prohibits use of such terms in help wanted ads as "boy" or "girl."

[538] 805 F. Supp. 802 (N.D. Cal. 1992).

[539] Shemefield v. Sheridan County Sch. Dist. 1, 544 P.2d 870 (Wyo. 1976) (hiring male without master's degree upheld over hiring female without master's degree because the male could be hired for less and in addition could coach); Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir. 1987) (salary disparity for male professor explained by occupational experience prior to being hired); Kenneweg v. Hampton Township Sch. Dist., 438 F. Supp. 575 (D. Pa. 1977); School Dist., Township of Millercreek v. Commonwealth Human Relations Comm'n., 368 A.2d 901 (Pa. 1977) (higher pay for boys' team coach who had heavier schedule and greater coaching burdens upheld); Oates v. District of Columbia, 824 F.2d 87 (D.C. Cir. 1987) (honoring commitment to previous football coach legitimate reason for not hiring female football coach). *Contra* Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985)(quality of scholarship as reason for denying tenure to female instructor was pretextual when four males with no better scholarship records were granted tenure); Wynn v. Columbus Mun. Separate Sch. Dist., 692 F. Supp. 672 (N.D. Miss. 1988) (school district combining athletic director position with football coach, on theory that it was "dominant sport," established discriminatory treatment of female applicant who had extensive experience, over 20 years with all sports in the school but who would presumably not be qualified to be hired as football coach.).

[540] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma for manual labor jobs had racially discriminatory impact).

[541] Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986) (white female Catholic with pro-abortion moral views lost in her alleged discrimination claim in not being hired for theology position); Pime v. Loyola Univ. of Chicago, 585 F. Supp. 435 (N.D. Ill. 1984) (hiring Jesuit for philosophy department was reasonably necessary to operation of university and fixing number of Jesuits at 7 in 31 faculty member department was reasonable.).

[542] *See* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992) (discharge of librarian on basis of out-of-wedlock pregnancy considered violation of Title VII's prohibition of discrimination based on pregnancy, even though school could discharge on basis of adultery); EEOC v. Fremont Christian Sch., 609 F. Supp. 344 (N.D. Cal. 1984), *aff'd* 781 F.2d 1362 (9th Cir. 1986) (health insurance benefits paid only to "head of household"

no application to the facts of the case,[841] or are inconsistently applied.[842] Physical tests must be job-related[843] and all physical and mental qualifications must pass muster under the "otherwise qualified" and "reasonable accommodation" standards of the Rehabilitation Act.[844] Qualifications which relate to marital status or anti-nepotism policies are suspect under Title VII,[845] and in fact may violate state law.[846] In general, an employer in a Title VII lawsuit will have to rebut any plaintiff's prima facie case by proving job-relatedness of the relevant qualification.[847]

(3) The act also exempts employment of persons of a particular religion if the institution is "in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[848] In a legal contest, the burden is on the religious institution to prove its religious preference. This exemption does not mean that religious institutions are free from scrutiny. An educational institution that is not controlled by a church and does not propagate a particular religion will not be able to claim this exemption. In *EEOC v. Kamehameha Schools/Bishop Estate*,[849] the schools with a Protestant-only hiring requirement were denied Title VII exemption because the schools controlled a church rather than vice versa and because Protestantism had become more of a general tradition

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employees interpreted by school to mean single persons and married men not an exempt BFOQ since exemption does not apply to discriminatory provision of benefits).

[841] Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D. Md. 1980) (Catholic lay female teacher in a Catholic school had Title VII cause of action when denied tenure because denial of tenure had nothing to do with religious exemption).

[842] Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (unmarried pregnant Catholic high school teacher had Title VII cause of action because, despite Catholic moral views on pre-marital sex, male employees were allegedly not discharged for engaging in pre-marital sex).

[843] Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983).

[844] *See supra*, notes 762-783 and accompanying text.

[845] *See* Stuckey v. U.S. Air Force, 790 F. Supp. 165 (S.D. Ohio 1992) (questions about marital status and child care considered to be per se violations of Title VII); LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES (K. Weeks, ed.) IV-39.

[846] *E.g.* *see* VA. CODE ANN., § 2.1-715 (Michie 1987) (prohibits discrimination on basis of "marital status.").

[847] *See* Personnel Admin'r of Mass. v. Feeney, 442 U.S. 256 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Peters v. Middlebury College, 409 F. Supp. 857 (Vt. 1976). *See also* L. Kanowitz, *Benign Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L. J. 1379 (1980).

[848] 42 U.S.C. § 2000e-2(e)(1).

[849] 990 F.2d 458 (9th Cir. 1993), *cert. denied* 114 S. Ct. 439 (1993).

than part of its mission. In *EEOC v. Mississippi College*,[552] a white Presbyterian female part-time instructor, who had not been hired for a full-time teaching position subsequently filled by a white Baptist male, was entitled to an evidentiary hearing in order for the college to have to present evidence of its preference to hire Baptists. However, once the college presented such proof, EEOC could not inquire further to determine whether the religious discrimination was a pretext for some other kind of discrimination. In *EEOC v. Southwestern Baptist Theological Seminary*,[553] an EEOC request for record-keeping information did not have to be honored as to all employees "at the Seminary [that] fit the definition of 'ministers'. . .": all faculty, "[t]he President and Executive Vice President of the Seminary, the Chaplain, the deans of men and women, the academic deans, and those other personnel who equate to or supervise faculty."[554] The request had to be granted as to the several hundred full and part-time support personnel and "those administrators whose functions relate exclusively to the Seminary's finance, maintenance, and other nonacademic departments."[555]

(4) Title VII exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[556] The permissible limits of this provision were explored in the context of an establishment clause challenge in *Amos v. Corporation of Presiding Bishop*.[557] In *Amos*, five employees of organizations wholly owned by the Mormon Church were discharged for failing to satisfy the church's worthiness requirements for a temple recommendation.[558] Four of the employees, whose complaints were dismissed by the federal district court, made clothing for temple use,[559] while the fifth, whose case went to the Supreme

[552] 626 F.2d 477 (5th Cir. 1980).

[553] 485 F. Supp. 253 (N.D. Tex. 1980), *rev'd in part* 651 F.2d 277 (5th Cir. 1981).

[554] 651 F.2d at 284-85.

[555] *Id.* at 285.

[556] 42 U.S.C. § 2000e-1.

[557] 107 S. Ct. 2862 (1987).

[558] *Amos*, 594 F. Supp. 791, 796 (D. Utah 1984) (temple recommend includes tithing, church attendance, and abstinence from alcohol and coffee).

[559] 618 F. Supp. 1013, 1018-20 (D. Utah 1985) (religious nature of function of making temple garments not defeated by employment of nonchurch member in the past, nonenforcement of religious criteria on commercial companies manufacturing temple clothing under a license, and enforcement of more stringent standards on employees after they were hired).

Court, was a building engineer in a gymnasium open to the public. *Amos* involved a serious Establishment Clause challenge that the Title VII exemption's apparent inclusion of all "activities,"[860] nonreligious as well as religious, violated the *Lemon* tripartite test: whether the statute has a secular purpose; whether the effect of the statute's enforcement neither advanced nor inhibited religion; and whether the statute fostered an excessive entanglement with religion.[861] The constitutional issue was framed because of the initial trial court's determination that the building engineer was involved in nonreligious activity.[862] The Supreme Court found a secular legislative purpose in Congress in relieving religious organizations from trying "to predict which of its activities a secular court will consider religious."[863] The second "effects" test was passed because "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose."[864] Finally, the third test was passed because "the statute effectuates a more complete separation of [church and state] and avoids the kind of intrusive inquiry into the religious belief that the District Court engaged in this case."[865] Despite the religious victory in *Amos*, two questions were left unresolved: whether the breadth of coverage under the current exemption

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[860] Prior to 1972 only "religious activities had been exempted but in 1972 after a lengthy debate "religious" was deleted. *See* 1972 U.S. CODE AND CONG. ADM. NEWS, pp. 2137, 1280. See discussion in *Amos*, 594 F. Supp. at 806-12.

[861] Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2015, 2111 (1971) (all three tests must be passed).

[862] *Amos*, 594 F. Supp. 15 802, 803. Legal precedence is fairly clear that a religious function is not only exempt under Title VII but is probably protected under the free exercise of religion clause. McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied* 409 U.S. 896 (1972) (failure to promote female ordained minister not subject to Title VII); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (discrimination charge for failure to hire female pastor barred by Title VII and free exercise clause because "the job of associate in pastoral care is so significant in the expression and realization of Seventh-Day Adventist beliefs.").

[863] *Amos*, 107 S. Ct. at 2868.

[864] *Id.* at 2868-69. In her concurring opinion, Justice O'Connor observed: "[t]he church had the power to put [the Gymnasium employee] to a choice of qualifying for a temple recommend or losing his job because the *Government* had lifted from religious organizations the general regulatory burden imposed by [Title VII]." *Id.* at 2874 (emphasis in original).

[865] *Id.* at 2870. The district court had found excessive entanglement because the gymnasium was not an integral religious part of the Mormon church and the statutory exemption benefitted religion by not creating restrictions against advancing religion through employments practices. *Amos*, 594 F. Supp. at 826-28. The *Lemon* test for excessive entanglement requires that a court "must examine the character and purpose of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. The *Amos* district court found the Title VII exemption violated the first two criteria but not the third.

> is required by the free exercise clause or establishment clauses;[866] and whether application of religious standards to newly acquired businesses exceeds the statutory exemption. The first question relates to the extent of the protection for a religious organization to enforce religious homogeneity.[867] The second question may depend on whether the business is nonprofit[868] on the one hand, or whether it is commercial or subject to government regulation on the other.[869]

Title VII has become a popular vehicle for prosecuting discrimination complaints for several reasons. First, under Title VII, proof of disproportionate or disparate impact does not require proof of intent to discriminate[870] (although disparate treatment requires proof of discriminatory intent), whereas Section 1983, Title VI and Title IX normally require proof of discriminatory intent.[871] A prima facie case is established by alleging that plaintiff:

> (1) is a member of a Title VII protected class;
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> (2) has made application for an available position or benefit for which he or she is qualified;
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> (3) was rejected under circumstances which give rise to an influence of unlawful discrimination.[872]

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[866] *See* Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992) (exemption from Title VII scrutiny applies only where employee passes ministerial-function test, such as teaching, spreading faith, church governance, supervision of religious order, or supervision of religious ritual and worship.)

[867] *See* EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied* 114 S. Ct. 439 (1993) (despite religious schools' program that consisted of comparative religious studies, scheduled prayers and services, quotation of Bible verses in school publications, and employment of nominally Protestant teachers, schools were essentially secular in nature and thus not entitled to Title VII exemption.)

[868] Three concurring justices in *Amos* drew the broad conclusion that exemption of any nonprofit activity of a religious organization was constitutionally permissible. *Amos*, 107 S. Ct. at 2872-73 (Brennan concurring), 2873 (Blackmun concurring), 2873-5 (O'Connor concurring).

[869] *See* United States v. Lee, 455 U.S. 252 (1982) (Social Security tax withholding applicable to employees of Amish employer); NLRB v. World Evangelism, 656 F.2d 1349 (9th Cir. 1981) (union representation of building engineers not violative of religious beliefs where religious organization's building used for commercial activities); King's Garden v. FCC, 498 F.2d 51, 54 (D.C. Cir. 1974) (religious radio station's employment of only evangelicals held violative of FCC anti-bias rules "where a job position has no substantial connection with program content, or where the connection itself is with a program having no religious dimension.")

[870] *See* Frazier v. Garrison I.S.D., 980 F.2d 1514 (5th Cir. 1993) (neutral employment practice can be violation of Title VII).

[871] *See Court Sex Discrimination Evidentiary Burdens under Title VII and Section 1983 Compared*, 53 S. CAL. L. REV. 1747 (1980). *Compare* Sable v. University of Md., 778 F.2d 164 (4th Cir. 1985) (no Title VII remedy for associate professor denied promotion because no proof of discriminatory intent by President) *with* Craik v. Minnesota State Univ. Bd., 731 F.2d 465 (8th Cir. 1984) (statistical methodology demonstrated disparate impact on females regarding salaries and promotions).

[872] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

However, once defendant employer proffers evidence of a nondiscriminatory reason for the employment decision, plaintiff must prove discriminatory intent[873] or he or she must prove that the reason given was pretextual.[874] A second advantage is that Title VII permits the use of statistics to prove a disparate impact based on relationship to the population at large,[875] a pool of applicants,[876] or a relevant geographical area.[877] Finally, Title VII offers a broad range of remedies: back pay of up to two years, injunctive reinstatement relief, and attorney's fees.[878] In addition to these remedies, 1991 amendments to Title VII now permit plaintiffs to recover money damages and to have the right to a jury trial.[879]

Conclusions and Recommendations for Title VII

(1) Title VII permits discrimination based on specific religious tenets. Sex discrimination would be permissible in elementary, secondary, or postsecondary physical education programs or dormitory assignments where religious tenets of moral propriety are at stake. Likewise, religious schools whose tenets prohibit religious instruction of men by women should be able to employ only men to teach religion course.

(2) On the other hand, Title VII protects only as far as the religious tenet. Thus, if a religious school has no religious tenet opposing female administrators (e.g. all administrators perform pastoral functions), then every female applicant who agrees with the school's doctrinal statement must be given equal consideration for a position or benefit.

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[873] Hatton v. Hunt, 780 F. Supp. 1157 (W.D. Tenn. 1991); Lewis v. Central Piedmont Community College, 689 F.2d 1207 (4th Cir. 1982).

[874] Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985) (rejection of female for faculty promotion was pretextual where four males with no better scholarship record were promoted).

[875] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[876] *Craik*, *supra* note 871; Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979) *cert denied* 100 S. Ct. 1865 (1980).

[877] Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975); Schaffler v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975).

[878] 42 U.S.C. § 2000e-5(g). *See* Wangsness v. Watertown Sch. Dist., 541 F. Supp. 332 (D.S.D. 1982) where all three remedies are discussed.

[879] 42 U.S.C. § 2000e. *See* Nigrelli v. Catholic Bishop of Chicago, 794 F. Supp. 246 (N.D. Ill. 1992) (however, in claim for damages, 1991 amendments would not be applied retroactively to permit discharged principal from pursuing claim for damages because of sexual misconduct of priest).

(3) Any religious BFOQ is overridden by a national established public policy (e.g., an employment decision on the basis of race can never be a BFOQ).[880]

(4) Recruiting processes, as well as processes pertaining to institutional benefits, should be formalized. A job description, applicant qualifications, and a legitimately advertised search should be made for each position. Religious institutions in particular tend to use informal recruiting procedures which may result in all high-level administrative positions occupied mainly by white males, a process which certainly raises questions of disparate impact on protected Title VII categories of potential applicants.

(5) The interviewing process needs to be standardized so that the same questions are asked of each candidate. Questions directed to female candidates concerning marital status, traveling with members of the opposite sex, or child care arrangements will be considered to be per se violations of Title VII.[881]

(6) Denial of promotions (or discharge) based on labelling (e.g., "troublemaker," or inaccurate letters of recommendation or retaliation for filing a discrimination charge constitute separate Title VII offenses.[882]

(7) Institutional inconsistencies, coverups, and subterfuges will usually be brought to light through discovery from questions such as: "Has the educational requirement for any job ever been waived?" "Has the state regulated license requirement for any job ever been waived?" "Has the requirement of mastery of an occupational skill for any job ever been waived?" In addition, comprehensive interrogatories would discover whether a job description and applicant qualifications had been prepared and whether the position had been advertised.[883]

(8) An important religious organization benefit, the housing allowance, should not be negatively affected by Title VII, even though women could never be eligible for the benefit in many religious organizations. Since the Internal Revenue Code

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[880] See *infra Government and Fundamental Public Policy* in chapter on "Governmental Regulation of Nonpublic Schools."

[881] See Stuckey v. United States Air Force, 790 F. Supp. 165 (S.D. Ohio 1982).

[882] LEGAL DESKBOOK, *supra* note 846 at IV-28–30. *See also* Indiana Civil Rights Comm'n v. Culver Educ. Found., 510 N.E.2d 206 (Ind. Ct. App. 1987) (retaliation for filing sex discrimination charge).

[883] See D. DANNER, PATTERN DISCOVERY: EMPLOYMENT DISCRIMINATION 33-45 (1981).

applies the benefit only to licensed, commissioned or ordained ministers performing ministerial functions,[884] a religious belief regarding the gender of ministers would seem to bring this matter within *Amos*.

Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA prohibits hiring, discharge, classification, or wage rate discrimination of employees based on age.[885] An ADEA prima facie case requires a complainant to allege:

(1) an employment decision unfavorable to complainant;

(2) an age of at least forty;

(3) favorable treatment of a person or persons younger than plaintiff; and

(4) allegations indicating evidence from which the inference can be drawn that the reason for the employer's decision was complainant's age.

A prima facie case under the ADEA can be established even though the person given favorable employment treatment is forty or older, as long as that person is younger than plaintiff.[886]

Effective January 1, 1987 the seventy-year-old ceiling was eliminated[887] except for faculty "serving under a contract of unlimited tenure."[888] However, the tenured faculty exception expired December 31, 1993.

The ADEA has four important exemptions or affirmative defenses:

(1) treatment "based on reasonable factors other than age;"[889]

(2) discharge or discipline "for good cause;"[890]

(3) treatment based on "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[891]

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[884] 26 U.S.C. § 1402 (c) (4).
[885] 29 U.S.C. § 623.
[886] Ware v. Howard Univ., 816 F. Supp. 737 (D.D.C. 1993).
[887] 29 U.S.C. § 631 (a). *See generally* R. Mawdsley, *Age Discrimination in Education: A New Amendment and New Problems*, 38 EDUC. L. REP. 387 (1987).
[888] 29 U.S.C. § 631 (d). *See* Pollis v. New Sch. for Social Research, 825 F. Supp. 584 (S.D.N.Y. 1993) (graduate school could require tenured faculty member to retire at age 70 even though 70-year-old limit would be repealed at end of 1993).
[889] 29 U.S.C. § 623 (f) (1).
[890] 29 U.S.C. § 623 (f) (3).
[891] 29 U.S.C. § 623 (f) (1).

(4) observance of the terms of a bona fide seniority or employee benefit plan.[862]

Unfavorable employment results may be the effect of a number of education decisions: reduction in force;[863] removal from an administrative position;[864] termination of employment;[865] nonrenewal of contract;[866] failure to hire;[867] denial of promotion;[868] and changes in the manner of awarding compensation or benefits.[869] There is one special word of caution for educational institutions which lay off faculty or staff to reduce expenses. Courts may find that simply laying off the highest paid employees could well violate the ADEA because the highest paid invariably are those forty and older.[870] Religious organizations are not exempt under the ADEA[871] and a complainant need not prove that the person who received the position or benefit is under forty, only that the person is "substantially" younger.[872] A complainant can meet his burden of producing evidence of age discrimination by a preponderance of the evidence through several different means: statements by supervisors;[873] direct treatment;[874] or disparate impact.[875]

Safety and budgetary concerns are always employment concerns. At least one court has upheld a mandatory sixty-five-year-old retirement age for

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[862] 29 U.S.C. § 623 (f) (2).

[863] Greaves v. Jefferson State Junior College, 494 So. 2d 889 (Ala. 1986).

[864] EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902 (S.D. Ill. 1986); McLaurin v. Fischer, 595 F. Supp. 318 (S.D. Ohio 1983).

[865] Dodge v. Susquehanna Univ., 796 F. Supp. 829 (M.D. Pa. 1992); Johnson v. University of Wis.-Milwaukee, 783 F.2d 750 (7th Cir. 1986); McCreanor v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982).

[866] Palmer v. District Bd. of Trustees, 748 F.2d 365 (11th Cir. 1984).

[867] Fronckberger v. Yadkin County Sch., 630 F. Supp. 291 (D.N.C. 1986).

[868] Kauffman v. Kent State Univ., 815 F. Supp. 1077 (N.D. Ohio 1993); Anderson v. University of N. Iowa, 779 F.2d 441 (8th Cir. 1985).

[869] Smith v. Alum Rock Union Elementary Sch. Dist., 8 Cal. Rptr.2d 360 (Cal. Ct. App. 1992) (state Education Code precluding State Retirement System members aged 60 or older from eligibility for disability benefits conflicted with ADEA); EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734 (E.D. Pa. 1985) (reduction of salary steps from 28 to 6).

[870] Metz v. Transit Mix, 828 F.2d 1202 (7th Cir. 1987); EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984).

[871] Soriano v. Xavier Univ. Corp., 687 F. Supp. 1188 (S.D. Ohio 1988); Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987).

[872] Chipollini v. Spencer Gifts, 613 F. Supp. 1156 (D.C.N.J. 1985); Di Benedetto v. Commonwealth, 497 N.E.2d 266 (Mass. 1986).

[873] *Di Benedetto*, 497 N.E.2d at 267 (statement by department chairman that the department was "looking for some younger people"); *McLaurin*, 595 F. Supp. at 321 (statements on several instances by division chairman that he was interested in attracting younger doctors).

[874] EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. at 904-05 (two administrators who had given notice of retirement more than one year in advance were demoted from administration to teachers for what would have been their last year).

[875] Lefforck v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) (in staffing a new state college, defendants plan reserving certain positions on "new" state college faculty for nontenured staff had disparate impact on tenured faculty from "old" city college). *See also* Anderson v. University of N. Iowa, 779 F.2d at 443 (use of statistical evidence in Title VII case to suggest race discrimination acceptable under ADEA).

school bus drivers because "safe transportation of infants to school and school-related activities is a paramount concern."[905] A school can hire within its budget, but a school that operates under a policy to hire only less experienced teachers may run the risk of creating a disparate impact on those forty and older.[907] On the other hand, a school can limit the number of years of experience which it is willing to compensate on its salary scale. Similarly, a school could probably hire only graduates with baccalaureate degrees because the connection between age and graduate degrees is far more tenuous than the connection between age and years of experience.[908] While there are a number of good reasons for not promoting or retaining an employee, such as documented poor performance, refusal to cooperate with a supervisor, or antagonism toward other employees,[909] failure to consider a person for a promotion simply because he is two years from mandatory retirement violates the ADEA.[910]

If a school demonstrates a nondiscriminatory reason for its employment decision, the burden shifts to the plaintiff-employee to establish by "clear and convincing evidence"[911] that the employer's reason is a discriminatory pretext. Thus, the burden of proof to prove pretext is higher than the burden of proof to establish a prima facie case.

Religious organizations are not exempt from the ADEA, except perhaps regarding employees whose obligation it is to perform ministerial functions.[912] Apart from this narrow exception, all other employees in religious organizations, including teachers, will be covered by the ADEA.[913] In religious organizations where plaintiff's pretext argument suggests a mixed motive in the employment decision (one based on age and the other on a

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[905] Sposato v. Amback, 453 N.Y.S.2d 149 (N.Y. Sup. Ct. 1982).

[907] Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980) (policy of hiring less experienced teachers violated ADEA).

[908] However, use of such terms in advertising as "young" or "recent college graduate" or considered to be violations of ADEA. 29 C.F.R. § 1625.4(a).

[909] See EEOC Deskbook, *supra* note 847 at IV-49.

[910] Marshall v. Board of Educ., 15 FEP Cases (BNA) 368 (D. Utah 1977).

[911] Graham v. Benbrook Sch., 692 F. Supp. 102 (D. Conn. 1988).

[912] See Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989) (ADEA not applicable to Seminary where faculty member performing ministerial functions discharged because no legislative intent to include religious institutions); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (discharge of hospital chaplain not subject to ADEA or Title VII scrutiny because "to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made").

[913] DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993) (math teacher in Catholic school covered by ADEA even though part of duties were religious in nature); Stonach v. Brothers of Order of Hermits of St. Augustine, 836 F. Supp. 1134 (E.D. Pa. 1993) (head chef in monastery covered by ADEA).

religious requirement), a court can apply church doctrine to determine whether the religious reason was in fact the reason for the decision.[914]

The handling of employee benefits can be a problem under the ADEA since the 1986 amendments protect group health coverage for employees sixty-five and older[915] and prevent cessation or reduction in employee pension benefit plans.[916] However, the amendments do not appear to affect life and disability insurance premiums which are related to age and which can be altered for older faculty and staff if the alterations are justified by cost consideration. The EEOC regulations make the following explanation:

> Benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.[917]

Equal Pay Act of 1964 (EPA)

The EPA, an amendment to the Fair Labor Standards Act (FLSA) provision on minimum wage,[918] prohibits employers from discriminating

> by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which required equal skill, effort and responsibility, and which are performed under similar working conditions.[919]

The EPA exempts differential wage payments made pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."[920] However, there is no exemption for religious institutions which, because of a religious belief concerning the relative positions

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[914] *See* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993) (court upheld dismissal of 50-year-old parochial school teacher who had married a divorced man in violation of church doctrine by determining that the reason for dismissal was religious rather than age).

[915] 29 U.S.C. § 623 (g).

[916] 29 U.S.C. § 623 (i). However, employer contributions to pension plans are not "benefits" under ERISA and for purposes of ADEA compliance with ERISA which permits cessation of employer contributions at age 65 satisfies ADEA. Kadane v. Hofstra Univ., 682 F. Supp. 155 (E.D.N.Y. 1988).

[917] 29 C.F.R. § 1625.10 (a)(1).

[918] 29 U.S.C. § 206(d).

[919] 29 U.S.C. § 206(d)(1).

[920] *Id.*

of men and women, choose to pay women less than men.[921]

The EPA has not been a particularly successful instrument for correcting alleged wage disparities because a prima facie case must demonstrate equal work, equal skills, equal effort, equal responsibility, and similar working conditions.[922] In assessing applicability of the EPA, courts "look to the actual job requirements and performance, not on-job classification or titles."[923] While teachers and administrators at all levels of education are excluded from FLSA,[924] they are not excluded from the EPA.[925] An employer against whom a female employee has stated a prima facie Equal Pay Act violation cannot correct the violation by reducing the pay of the similarly situated male employees.[926]

The EPA requires that jobs being compared be substantially equal, not just comparable.[927] Thus, jobs performed by the university's female director of nursing services, who was also an associate professor and associate administrator at the university hospital, was not substantially equal to jobs held by two male associate hospital administrators.[928] Comparison between the salaries of faculty members in higher education can be especially difficult where legitimate factors such as scholarly work and teaching performance are at issue.[929]

The requirement of equality is especially problematic in athletics. A female teacher who spent 100% of her time teaching lecture classes was not substantially equal to a men's varsity basketball coach who spent three-quarters of his time teaching and one-quarter coaching.[930] Likewise, a Division I male basketball coach with a twelve-month contract and extensive travel and

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[921] EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700 (S.D. Ohio 1990) (EPA had minimal impact of religious educational institution's beliefs regarding familial roles of men and women to extent head of household allowance paid to married male faculty members with dependents but not to female faculty members; institution free to practice religious beliefs that did not unlawfully discriminate in wage scale on basis of gender). *See* Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983) (less than minimum wage paid to female employees violated EPA). *See also* EEOC v. Fremont Christian Sch., 609 F. Supp. 344 (D. Cal. 1984), *aff'd* 781 F.2d 1362 (9th Cir. 1986) (religious school's limitations of health insurance benefits to "head of household" employees which school believed could only be performed by husband violated EPA).

[922] *See* Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987).

[923] Orahood v. Board of Trustees of Univ. of Ark., 645 F.2d 651, 654 (8th cir. 1981). *See also* Goodrich v. International Bhd. of Elec. Workers, AFL-CIO, 815 F.2d 1519 (D.C. Cir. 1987) (only skills actually required for job are relevant, not abilities of those currently in job).

[924] 29 U.S.C. § 213 (a) (1).

[925] Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982).

[926] EEOC v. Romeo Community Sch., 976 F.2d 985 (6th Cir. 1992).

[927] EEOC v. Kenosha Unified Sch. Dist. No. 1, 620 F.2d 1220 (7th Cir. 1980).

[928] Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984).

[929] *See* Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974 (8th Cir. 1991) (female assistant professor denied tenure had no EPA claim).

[930] Hein v. Oregon College of Educ., 718 F.2d 910 (9th Cir. 1983).

communications responsibilities was not substantially equal to an AIAW female women's basketball coach with a nine-month contract and with coaching duties that were generally limited to three days per week.[931] In a nonathletic situation, an institution's male controller, who supervised more employees and whose position required knowledge and experience in financial and accounting matters, was not substantially equal to a female acting director of the Office of Institutional Studies who dealt with statistics and who supplied materials to the university and to governmental agencies as requested.[932] In general, positions which carry added responsibilities such as curriculum development and a heavier measure of accountability by reporting higher in the administration will justify higher compensation.[933] Failure of an EPA plaintiff to select an appropriate office to compare herself with will be fatal.[934]

Institutions can reply on factors other than gender to justify wage differentials, such as a salary retention policy of maintaining an employee's salary upon change of assignment within the institution,[935] and on qualifications, such as a doctoral degree and publications.[936] Market conditions based on particular experience or skills is a factor other than gender, provided the institution has investigated market rates.[937] However, once an institution becomes aware that a female employee is receiving less pay for equivalent work, the institution has a responsibility within a reasonable period of time to evaluate the position.[938]

Title VII has become an alternative to EPA in attempting to prove wage disparity under a less onerous "comparable worth" theory. The 1976 amendment to Title VII which authorized employers to "differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees if such differentiation is authorized by provisions of [EPA],"[939] has basically had the effect of transferring the four EPA

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[931] Jacobs v. College of William and Mary, 517 F. Supp. 791 (E.D. Va. 1980).

[932] Orahood v. Board of Trustees of Univ. of Ark., 645 F.2d 651 (8th Cir. 1981).

[933] Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980) (Both teachers were hired for the 1974-75 school year with the male receiving $9,000 and the female $7,500. The salary increases for the male teacher for the years exceeded his female counterpart from $200-$800 each year).

[934] *Jacobs*, *supra* note 931 (comparison to baseball coach not appropriate because coach taught full time while plaintiff did not); *Hein*, *supra* note 929 (comparison only to highest paid male employee and ignoring lower paid male employee presented flawed prima facie case).

[935] Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir. 1987).

[936] Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987). *See also Brousard-Norcross*, 935 F.2d at 979, note 10 (court appears to suggest that qualifications of faculty members can be distinguished even as to whether they received an Ed.D. rather than a Ph.D.).

[937] Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985) (college failed to inform itself of market rates); Chang v. University of R.I., 606 F. Supp. 1161 (D.R.I. 1985) (university failed to demonstrate validity of outside offer to higher paid male faculty member).

[938] EEOC v. Maricopa County Community College, 736 F.2d 510 (9th Cir. 1984).

[939] 42 U.S.C. § 2000e-2(h).

exemptions to Title VII.[940] In the leading case, *Gunther v. County of Washington*,[941] the Supreme Court did not find that pay disparity violated the EPA because of differences in responsibilities, but it did leave open a Title VII lawsuit where plaintiffs could prove that their wages were depressed because of intentional sex discrimination in which the wage scale for female guards—but not for male guards—was set at a level lower than its own survey of outside markets and the worth of the jobs warranted.[942] However, the court specifically noted that because of the uniqueness of the *Gunther* facts, plaintiff's claims were not based "on the controversial concept of comparable worth."[943] The concept of comparable worth does not seem to have made significant headway. Perhaps the reason can be explained by the EPA overlay of Title VII.

> [W]hen the issue of salary differentials can be brought under both statutes (Title VII and Equal Pay), the legal standards established under the Equal Pay Act controls . . . Title VII . . . refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act . . . . It simply cannot be asserted that Title VII's standard supplants or undermines the standards established under the Equal Pay Act.[944]

Nonetheless, school administrators do have a responsibility to set fair wage structures. While market rates may in fact justify lower comparable wages for office clerks, food service workers, librarians, nurses, and teachers aides, most of whom are female, schools should not be mere slaves to market conditions.

Americans with Disabilities Act (ADA)[945]

The ADA is included under this employment section because one important part of the Act deals with employment in the private sector, and another one addresses public accommodations, which also impacts nonpublic schools. Title I of the ADA, which became effective for employers on July 26, 1992, prohibits private employers with fifteen or more employees from discriminating against individuals with disabilities in "job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment."[946]

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[940] Melani v. Board Higher Educ. of New York, 561 F. Supp. 767 (D.C.N.Y. 1983).
[941] 452 U.S. 161 (1981).
[942] *Id.* at 165.
[943] *Id.* at 166.
[944] Melanson v. Rantoul, 536 F. Supp. 271, 286 (D.R.I. 1982).
[945] 42 U.S.C. § 12101 *et seq.*
[946] 42 U.S.C. § 12112.

Except for the important distinction that all private employers with fifteen or more employees are covered whether or not federal financial assistance is received, the ADA tends to follow the Rehabilitation Act very closely. The ADA's definition of disabled person, identical to that of the Rehabilitation Act, denotes an individual with

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment;
>
> (C) regarded as having such impairment.[947]

Unless "undue hardship" can be demonstrated (generally tied to financial resources of the employer),[948] employers must make "reasonable accommodation" to an individual's disability. "Reasonable accommodation" may include

> (A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[949]

Preemployment medical inquiries and examinations are prohibited, except that a medical examination can be required after an offer has been made, and the job can be conditioned on the examination results, provided that "all entering employees are subjected to such an examination regardless of disability."[950] The Act does not protect "any employee or applicant who is currently engaging in the illegal use of drugs,"[951] but the Act does protect an individual who has completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, as well as an individual who is currently participating in a supervised rehabilitation program and is not engaging in the use of illegal drugs.[952] Individuals with communicable diseases are expressly protected by the statute, except that if an employer has an employee with a communicable disease who handles food and the

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[947] 42 U.S.C. § 12102

[948] 42 U.S.C. § 12111(10)

[949] 42 U.S.C. § 12111(9)

[950] 42 U.S.C. §§ 12112(c)(2) and (3)

[951] 42 U.S.C. § 12114(a)

[952] 42 U.S.C. § 12114(b)

employer cannot make a reasonable accommodation, the employer "may refuse to assign or continue to assign such individual to a job involving food handling."[953]

Religious employers are not prohibited by the ADA from "giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [religious employer]."[954] Thus, a person who otherwise meets the employer's religious requirements must be given the same consideration as that of any other job applicant (or current employee if the employment decision involves a promotion or other job benefit). Presumably, religious employers will not be permitted to circumvent the ADA by creating and emphasizing religious requirements that might exclude persons with certain disabilities, such as AIDS.

Title III of the ADA prohibits discrimination in "public accommodations," which include "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education."[955] The obvious effect of Title III is to protect students. Generally, Title III prohibits unequal or separate benefits for students with disabilities and specifically requires that "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."[956] In *Rothman v. Emory University*,[957] a law school dean's negative recommendation letter regarding a student with a disability, which was sent to the Illinois Board of Law Examiners, fell within the statutory language of "services" or "privileges," and thus the student had stated an ADA claim against the law school and the dean. Changes in buses and facilities to accommodate those with disabilities is required where "readily achievable" which, like "undue hardship" under Title I, means adjustments must be made unless there is "much difficulty or expense."[958]

However, "religious organizations or entities controlled by religious organizations, including places of worship" are exempt from Title III.[959] What may seem like a statutory redundancy concerning "religious organizations" may in fact have legal significance after the ruling in *EEOC v. Kamehameha Schools/Bishop Estate*.[960] In that case, the Ninth Circuit Court of Appeals held that a religious school not controlled by a church was not entitled to a Title VII religious exemption to enforce its Protestant-only employment requirement. Whether religious organizations not controlled by churches

[953] 42 U.S.C. § 12113(d).
[954] 42 U.S.C. § 12113(e).
[955] 42 U.S.C. § 12181(7).
[956] 42 U.S.C. § 12182(b)(1)(A) and (B).
[957] 828 F. Supp. 537 (N.D. Ill. 1993).
[958] 42 U.S.C. § 12181(9).
[959] 42 U.S.C. § 12118.
[960] 990 F.2d 458 (9th Cir. 1993), *cert. denied* 114 S. Ct. 439 (1993).

(or other church-like organizations such as temples or synagogues) will lose their ADA exemption remains to be seen.

Family and Medical Leave Act of 1993[961]

This Act was passed by Congress to accommodate working parents who may be forced to choose between job security and the caretaking or medical needs of children, a spouse, or parents. A special section of the Act applies to "any private elementary or secondary school and an eligible employee of the school."[962] The Act contains no exemption for religious schools.

An employer is generally defined as any person engaging in commerce with fifty or more employees,[963] although there is no clear indication that this fifty-employee limit applies also to schools. An employee is eligible for the medical and family leave benefits if he or she has worked at least twelve months for the employer.[964] The leave entitlement is twelve workweeks during any twelve-month period and can be used for the following:

> (A) . . . the birth of a son or daughter of the employee and . . . to care for such son or daughter.
>
> (B) . . . the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) . . . care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health medical condition.
>
> (D) . . . a serious health condition that makes the employee unable to perform the functions of the position of such employee.[965]

The leave can be taken unpaid if the employer "provides paid leave for fewer than twelve workweeks . . . ."[966] Where necessity for the leave is "foreseeable" according to standards in the Act, "the employee shall provide the employer with not less than thirty days' notice."[967] Under certain conditions, an employer may require "certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate."[968]

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[961] 29 U.S.C. §§ 2601-2654.
[962] 29 U.S.C. § 2618(a)(1)(B).
[963] 29 U.S.C. § 2611(3)(A).
[964] 29 U.S.C. § 2611(2)(A)(i).
[965] 29 U.S.C. § 2612(a)(2).
[966] 29 U.S.C. § 2612(d)(1).
[967] 29 U.S.C. § 2612(e)(1).
[968] 29 U.S.C. § 2613(a).

On return from the leave, except for certain highly compensated employees,[969] the employee is to be restored "to the position of employment held by the employee when the leave commenced . . . or . . . to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."[970] However, the decision concerning restoration of an employee of a private elementary or secondary school can be made "on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements."[971] Schools may be subject to state Medical Leave Acts as well as to the federal act, but there is no indication as to whether the federal statute is intended to preempt state medical leave statutes.[972]

Enforcement of the Act can be either by the Secretary of Labor or by the aggrieved employee.[973] In addition to appropriate equitable relief, such as employment, reinstatement, and promotion, the employee can recover compensatory damages, and in certain cases an additional amount as liquidated damages.

Individuals With Disabilities Education Act (IDEA)

This third area of federal anti-discrimination affects nonpublic schools far less directly and therefore will be dealt with only minimally. The IDEA made a serious effort to redefine the nature and definition of education, in that the system was expected to adapt to the needs of handicapped students and parents were to be treated as equals in the assessment of their children's special education needs.[974] The IDEA provides that policies and procedures be set to assure that provision be made for "the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools."[975] Federal regulations place the burden on the state

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[969] 29 U.S.C. § 2614(b).

[970] 29 U.S.C. § 2614(a).

[971] 29 U.S.C. § 2618(e).

[972] See Richland Sch. Dist. v. DHILR, 498 N.W.2d 826 (Wis. 1993) (where state medical leave statute provided greater benefit than collective bargaining agreement, the statute prevails; in this case, a teacher was able to substitute 5 days of reimbursable leave under the collective bargaining agreement for unpaid adoption leave under Wisconsin's Family Medical Leave Act. The collective bargaining agreement did not provide for paid leave when a child was to be adopted).

[973] 29 U.S.C. § 2617.

[974] For example, an IEP is a "written statement of each handicapped child developed in any meeting by a representative of the local educational agency . . . the teacher, the parents or guardians of each child . . ." 20 U.S.C. § 1401 (19). Parents have the procedural right "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and to obtain an independent educational evaluation of the child . . ." 20 U.S.C. § 1415 (b) (1).

[975] 42 U.S.C. § 1413 (a) (4) (A).

educational agency on behalf of every nonpublic school student receiving special education or related services from a public agency to "[i]nitiate and conduct meetings to develop, review, and revise an individualized education program [IEP] for the child."[976] Theoretically, the IEP could include special education or related services at the nonpublic school as well as the public school.[977] The key statutory and regulatory terms are "free appropriate public education" (FAPE),[978] an "individualized education program," (IEP)[979] and "the least restrictive environment."[980]

Disabled students can be enrolled in nonpublic schools in two ways: placement there by a public school according to a student's IEP; and placement directly by a parent. Normally, most religious schools will not have staff or facilities to accommodate special education students and therefore those schools would not benefit from funds under IDEA directed to parents for nonpublic school expenses. If nonpublic schools accept handicapped students, they may be subject to some state statutory restrictions: inability to dispute salary ceilings for teachers of handicapped children;[981] limitations on changing the student's program;[982] and restrictions on the profits for private schools.[983] Where a parent unilaterally places a handicapped child in a nonpublic school and then seeks reimbursement for tuition and special services,[984] the parent takes the risk that such placement will be considered inappropriate and no EPA funds will be forthcoming.[985]

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[976] 42 U.S.C. § 1413(a)(4)(A).

[977] 34 C.F.R. § 300.341(b)(2). An IEP must be prepared for each handicapped child "enrolled in a parochial or other private school."

[978] 20 U.S.C. § 1401(18).

[979] 20 U.S.C. § 1401(19).

[980] 20 U.S.C. § 1412(5)(B); 34 C.F.R. §§ 300.550–300.554.

[981] Organization to Assure Serv. v. Ambach, 434 N.E. 2d 1329 (N.Y. 1982).

[982] Woods Sch. v. Commissioner Dep't of Educ., 514 A.2d 686 (Pa. Commw. Ct. 1986).

[983] Council of Private Sch. for Children with Special Needs v. Cooperman, 501 A.2d 575 (N.J. Super. Ct. 1985).

[984] *See* Thornock v. Boise Indep. Sch. Dist., 1987-88 EHLR Dec. 559:486 (parent won reimbursement for tuition and cost of one-to-one aide required by parochial school in which parents placed child).

[985] Hiller v. Board of Educ. of Brunswick Cent. Sch. Dist., 687 F. Supp. 735 (N.D.N.Y. 1988) (no tuition reimbursement where nonpublic school not state-approved for handicapped); Antokowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988) (tuition reimbursement denied where placement occurred in nonapproved school). *Contra* Aaron S. v. Westford Pub. Sch., 1987-88 EHLR Dec. 509:122 (school district responsible for tuition and transportation as result of inadequate IEP); Rouse v. Wilson, 1987-88 EHLR Dec. 559:214 (tuition reimbursement ordered where public school IEP had been unsuccessful in the past).

Following *Aguilar v. Felton*,[986] the constitutionality of paying for support personnel to perform special education services in religious schools was questionable. However, the more recent Supreme Court case, *Zobrest v. Catalina Foothills School District*,[987] upheld the right of a hearing impaired child voluntarily enrolled by parents in a parochial school to receive the benefit of a sign interpreter under IDEA against an Establishment Clause challenge. Resurrecting the child benefit doctrine, the court found interpreter services under IDEA to be part of general services available on a neutral basis to qualified children, whether enrolled in public or parochial schools. Benefit to the parochial school in *Zobrest* was considered to be only indirect since the decision to place the child in the school was that of the parent. Since there was no incentive for the parent to choose a parochial school, the interpreter's presence in the parochial school could not be attributed to governmental decision-making. Contrary to earlier cases in which the court struck down aid to parochial schools where the aid provided was considered to have relieved the parochial schools of costs they would otherwise have to meet,[988] the *Zobrest* court would have found a benefit to the school only if the school had made a profit from tuition, if the student would not have enrolled in the parochial school without the interpreter, and if the student's seat would have been left unfilled.

Because the case arose under an Establishment Clause challenge, the provision of services at the present time in parochial schools is *permitted*, but *not required*. Public school districts may be reluctant to provide services in parochial schools that they consider duplicative of services offered at public school settings. And courts may be reluctant to order on-site, low-incidence services where public school districts operate under fiscal restraints.[989] Furthermore, there is no reason to expect *Zobrest* to be extended beyond individual services identified under an IEP to include the kinds of general counseling/guidance services or general therapeutic services struck down by earlier Supreme Court decisions.[990]

The policy implications of *Zobrest* are interesting. Because Zobrest has opened the door to IEP services in nonpublic parochial schools, parents with children in these schools can be expected to become more militant in demanding that the same services the child would have received in the pub-

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[986] 105 S. Ct. 3232 (1985) (public school employees teaching disadvantaged children in parochial schools under Title I held an establishment clause violation).

[987] 113 S. Ct. 2462 (1993).

[988] School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975).

[989] *See* Barnett v. Fairfax County Sch. Bd., 721 F. Supp. 757 (E.D. Va. 1989), *aff'd* 927 F.2d 146 (4th Cir. 1991), *cert. denied* 112 S. Ct. 175 (1991) (public school district not required to provide sign-language interpreter in student's home school when one was available in a centralized location).

[990] *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

lic school be provided in the nonpublic school. The appropriate response by a nonpublic school has been made more problematic by *Zobrest*. Prior to *Zobrest*, most nonpublic schools would probably not have provided services for disabled students, but after the case, schools have a number of options: to continue to reject students who have disabilities that cannot be accommodated by the school; to admit these students only if parents agree to pay for needed services, regardless of whether the services will be reimbursed and/or paid for by the public school district;[69] or to admit the child and cooperate with the parent to acquire on-site services under *Zobrest*. The last option is problematic under *Zobrest* since the school would seem to have a direct benefit from the service. In any case, unless IDEA services are held to be a matter of right for students in nonpublic schools, the extent of benefits under *Zobrest* may not be significantly expanded.

[69] This was the original choice in *Zobrest*. The parents paid for the sign-language interpreter for one year before demanding reimbursement from the public school district and an order for the service in the parochial school.

CHAPTER VI

Special Problems

Copyright

The cornerstone of the use of copyrighted materials is the statutory and judicial concept of "fair use." The fair use section of the Copyright Act[692] provides that reproduction of copyrighted material for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright." Notwithstanding these exceptions, the Act assesses fair use according to four factors:

(1) the purpose and character of the use,[693] including whether such use is of a commercial nature or is for nonprofit educational purposes;[694]

(2) the nature of the copyrighted work;[695]

(3) the amount and substantiality of the portion used;[696]

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[692] 17 U.S.C. § 107.

[693] *See* Wright v. Warner Books, 953 F.2d 731, 736 (2d Cir. 1991) (in finding that use of material from letters and journals in a biography were fair use, the court observed that analytical research in a biography "furthers the goals of the copyright laws by adding value to prior intellectual labor")

[694] *See* Educational Testing Serv. v. Katzman, 793 F.2d 533 (3d Cir. 1986) (defendant's use of plaintiff's testing materials in a business to assist students to score higher on the SAT violated the Copyright Act because defendant operated a commercial business, and the exemption favors noncommercial use. The court also determined that whether or not such review service was educational teaching was irrelevant).

[695] *See* Association of Am. Medical Colleges v. Cuomo, 928 F.2d 519 (2d Cir. 1991) (in state effort to require publication of MCAT questions and answers, court determined that the MCAT was unpublished for fair use purposes and greater protection is given to unpublished material); Wright v. Warner Books, 953 F.2d 731 (2d Cir. 1991) (unpublished letters and journals entitled to greater protection over claim that they were subjects of fair use).

[696] For cases where use was found to be insubstantial with no copyright violation, *see* New Era Publications v. Carol Publishing, 904 F.2d 152, 158 (2d Cir. 1990) (5-6% of 12 works and 8% of 11 works with "each of the 11 being only a few pages in length"); MacTone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1987) (4.3% of work); Wright v. Warner Books, 953 F.2d 73 (2d Cir. 1991) (one percent of total letters and journals). For cases where use was considered to be substantial, and thus a violation of fair use, *see* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (300 words copied considered to be copyright violation because the "heart" of the book had been used); Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987) (quotations and paraphrasing totalling two-thirds of 17 letters and 10% of 17 other letters); Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (passages copied ranged from 14 to 110 pages, representing 5.2% to 15.1% of the works); Iowa State

(4) the effect of the use upon the potential market for or value of the copyrighted work.[997]

The leading educational case interpreting fair use continues to be *Marcus v. Rowley*.[998] In Marcus, plaintiff had written a thirty-page booklet on cake decorating, twenty-nine of which were her original creation. Plaintiff had registered her booklet with the Register of Copyrights and all copies of the booklet contained an encircled "c" followed by her name. Plaintiff sold her booklet to students for $2.00 each, $1.00 of which was profit. Defendant subsequently prepared a twenty-four page cake decorating learning activity package, fifteen pages of which were from plaintiff's booklet. Defendant sold none of her packages but instead placed them on file for students who wanted to do further work. Ironically, defendant's use of plaintiff's materials came to light when one of plaintiff's students, after comparing plaintiff's booklet and defendant's package, accused plaintiff of plagiarizing defendant's work.

In ruling for plaintiff, the court addressed each of the fair use factors. Regarding the first factor, the court noted that defendant's purpose was nonprofit educational rather than commercial. However, the court added that there "is strong indicia of no fair use" when "the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used."[999] The absence of fair use was aided by defendant's failure to secure permission or furnish attribution to plaintiff. The second factor requires consideration of whether the work is informational or creative. Plaintiff's booklet had both information available in other books as well as creative hints and creativity in assembling the booklet. Because of a lack of certainty regarding the amount of creativity, the court felt the consideration of the second factor made no contribution to a consideration of fair use. The third factor concerned "both the quantity and quality of the alleged infringement."[1000] Defendant Rowley's package contained fifty percent of material from plaintiff's booklet, most of it copied verbatim, and that fifty percent constituted the substance of defendant's book. The court rebutted defendant's argument that facts in the material copied were in the public domain by noting that "defendant engaged in virtually verbatim

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Univ. Research Fund v. American Broadcasting Corp., 621 F.2d 57 (2d Cir. 1980) (8% of videotape used that had never been broadcast).

[997] Value of copyrighted material can be determined not only by the amount of material actually used, but also by the necessity to cease using copyrighted material as result of infringement. *See* Educational Testing Serv. v. Katzman, 793 F.2d 533 (3d Cir. 1985) (copyright violation where use of SAT test questions by a review course meant that Testing Service had to retire at least 289 questions).

[998] 695 F.2d 1171 (9th Cir. 1983).

[999] *Id.* at 1175.

[1000] *Id.* at 1176.

copying."[1001] Thus, there was clear evidence of substantial quantitative and qualitative copying. Concerning the fourth factor, the court found for the defendant because, despite a student's refusal to purchase plaintiff's booklet (he accused plaintiff of plagiarizing), there was not sufficient evidence to conclude that "defendant's copying had any effect on the market for the plaintiff's booklet."[1002] However, weighing all four factors, the court concluded that they "weigh decisively in favor of the conclusion of no fair use"[1003] and remanded the case for a determination of damages.

In a more recent copyright case involving education but without the substantive merit, a federal court denied a copyright remedy to students and their teacher. In *Dodd v. Fort Smith Special School Dist. No. 100*,[1004] a teacher and her students, who had raised funds to publish a book about a local hero and who had written a manuscript after lengthy research, sued when the book was published identifying the school principal as author and failing to give credit to the teacher and students. Plaintiffs were denied remedies under both the Copyright Act and section 1983, the Copyright Act because registration of a copyright is a prerequisite to an infringement action,[1005] and section 1983 because the Copyright Act preempts all other remedies.[1006]

Fair use does not rely totally on judicial interpretation of section 107 since there are a number of statutory provisions affecting educational use. The Copyright Act does not generally exempt nonprofit or educational uses as was the case prior to the 1976 Copyright Act. Therefore, all educational institutions are subject to the Act's terms.

An important distinction in the Copyright Act is the difference between copying and performance. For example, permission to make copies of a copyrighted work does not in itself include permission to perform those works. For the benefit of religious schools, the Act does exempt "performance of a nondramatic literary or musical work or of a dramatic musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."[1007] Dramatic literary or musical works are those with sequential material including a plot and sequential story line, e.g., opera, cantata, musical comedy, play, motion picture, filmstrips. Nondramatic work would presumably be permissible under this

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[1001] *Id.* at 1177.
[1002] *Id.*
[1003] *Id.*
[1004] 666 F. Supp. 1278 (W.D. Ark. 1987).
[1005] 17 U.S.C. §§ 408(a), 411. However, copyright protection begins as soon as "original works of authorship [are] fixed in any tangible means of expression." 17 U.S.C. § 102.
[1006] 17 U.S.C. § 301(a).
[1007] 17 U.S.C. § 110(3).

exemption without securing the copyright owner's permission, unless the selection is "dramatic in its very nature and purpose."[1008] The exemption for performances in religious settings exhibits the reality of constitutional conflict if courts attempted to intervene and assess the nature and extent of acceptable worship under the Copyright Act.[1009]

Dramatic and nondramatic works can also be distinguished as to any direct or indirect commercial advantage. Nondramatic literary or musical works are exempt for performance (1) if there is no direct or indirect admission charge; or (2) if there is a charge, any proceeds after reasonable costs go exclusively for educational, religious, or charitable purposes and not for private financial gain. Fees or percentages cannot be paid to performers, producers, promoters, or organizers; however, payment of a salary to an employee, such as a band or choir director whose function includes performances, does not constitute a violation.[1010]

The Copyright Act also exempts:

> performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and the person responsible for the performance knew or had reason to believe was not lawfully made.[1011]

The key features of this exemption are:

(1) "face-to-face teaching activities" which exclude "large assemblies or mass meetings and which are not for the purpose of instruction." Inclusion of persons who are not students would seem to place the activity outside the exemption.

(2) limitation of the performance or display to "instruction." Thus, use of a rented videotape or film for classroom or school sold for entertainment purposes exceeds the exemption, but may be permissible according to the terms of the rental agreement.

(3) "lawfully made" audiovisual works, especially videotapes. Teachers who rent or lease, or loan videotapes can use them in face-to-face teaching for instructional purposes under section

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[1008] H. Howell, The Copyright Law 52-53 (BNA 1979).

[1009] See M. Nimmer, NIMMER ON COPYRIGHT, § 110 (A) (1978) ("the copyright act" may not be read as independent of and uncontrolled by the First Amendment.").

[1010] 17 U.S.C. § 110 (4) (A) (B).

[1011] 17 U.S.C. § 110 (1).

110, even though such use would otherwise be prohibited under section 109, unless the teacher had acquired ownership of the tape.[1012] If the teacher had reason to believe the rented, leased, or loaned videotape was not a lawfully made copy, then the teacher would have exceeded the section 110 exemption. For example, an unauthorized home copy made from a rental tape is clearly not "lawfully made," but an off-the-air copy of commercial programming would now seem to be lawfully made under *Sony Corporation v. Universal City Studio*.[1013] However, off-the-air videotapes from noncommercial educational broadcasts may be used in teaching "for a period of no more than seven days from the date of the transmission . . . [if they] are destroyed before or at the end of such period."[1014] Courts have taken a dim view toward development of libraries of off-the-air videotape copies and video copies of rental films, even if used only for teaching purposes.[1015] Just what kind of evidence should cause a teacher to believe a videotape has not been "lawfully made" is difficult to predict. To be safe, teachers could make inquiry regarding how a copy came to be made for every blank videotape without a copyright owner's label.

Libraries come into the copyright picture because they are permitted under the Copyright Act to make a copy of a work from their own collections or from the collection of another library acquired at the request of a library user through interlibrary loan, if the following conditions are met:

(1) The library must determine through "reasonable investigation that a copy . . . of the copyrighted work cannot be obtained at a fair price."[1016]

(2) "The copy . . . becomes the property of the user."[1017]

[1012] 17 U.S.C. § 109(c).

[1013] 464 U.S. 417 (1984) (Court upheld home use of video recorders for time shifting viewing). *See generally* R. Mandeley, *Use of Videocassettes in the Classroom*, 32 EDUC. L. REPR. 1163 (1986).

[1014] 17 U.S.C. § 109(c).

[1015] Encyclopedia Britannica's Educ. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982) (copyright infringement found where county educational services organizations videotaped without permission copyrighted films and made available on request copies of its videotape masters to schools). *See also Sony Corp.*, *supra* note 1013, at 442 (Court considered home videotaping to be fair use as "time shifting for private home use" and concluded for lack of evidence that such videotaping was not for library building).

[1016] 17 U.S.C. § 108(c).

[1017] 17 U.S.C. § 108(e)(1).

(3) "[T]he library . . . had no notice that the copy . . . would be used for any purpose other than private study, scholarship or research."[1018]

(4) "[T]he library . . . displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."[1019]

Libraries unable or unwilling to perform this fair price investigation regarding all forms of copies may nonetheless loan video recorders to users without fear of liability provided "that such equipment displays a notice that the making of a copy may be subject to the copyright law."[1020] However, nothing "excuses a person who uses such reproducing equipment or who requests a copy . . . from liability for copyright infringement for any such act, or for later use of such copy . . . if it exceeds fair use as provided in section 107."[1021]

The most persistent educational problem concerns the production and classroom distribution of multiple photocopies. Despite section 107, which indicates that multiple photocopying for teaching purposes is fair use,[1022] multiple photocopying is controlled by a separate Agreement[1023] which was included in the congressional history of the text and which is far from clear.[1024] Teachers need to be certain that they understand the following features of the Agreement reproduced at the end of this chapter:

(1) The Guidelines are minimum, not maximum, standards of fair use and therefore fair use could be more broadly defined than is suggested in these Guidelines.

[1017] *Id.*

[1018] 17 U.S.C. § 108 (e) (2). A Notice Warning Concerning Copyright Restrictions can be found at 37 C.F.R. § 201.14 (b):

The copyright law of the United States (Title 17, United States code) governs the making of photocopies or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purpose in excess of "fair use" that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgement, fulfillment of the order would involve violation of copyright law.

[1019] 17 U.S.C. § 108 (f) (1).

[1020] 17 U.S.C. § 108 (f) (2). Intent to infringe is not a necessary precedent to a finding of copyright infringement. However, in the case of copyright violations where the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100." 17 U.S.C. § 504 (c) (2). But for employees of nonprofit educational institutions who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use" the court "shall remit statutory damages." *Id.*

[1021] *Supra* note 982 and accompanying text.

[1022] For a copy of this Agreement, see end of chapter.

[1023] See R. Mandeles and S. Permuth, *Multiple Photocopying in Educational Institutions*, 10 NOLPE School L.J. 18 (1981).

(2) Since the Copyright Act does not declare teachers' fair use to be more extensive than students, the "Single Copying for Teachers" guidelines should apply to students, provided that the copy is used for the same purpose as teachers.

(3) Compliance with the Guidelines requires meeting all three tests: brevity, spontaneity, and cumulative effect.

(4) Poetry, prose, and "special" works have separate requirements which have to be harmonized with regard to the item(s) being photocopied.

(5) The amount of time between "inspiration and decision" under "Spontaneity" could well be as little as twenty-three weeks if the teacher knows from whom to request permission, or even longer if the teacher does not know, or has no address for, the copyright owner.

(6) Simply because spontaneity is met for one course does not mean the that test would be passed if multiple copies of the same item were to be distributed the next time the course was taught.

(7) While somewhat cumbersomely stated, "cumulative effect" focuses on what can be used for one course and what can be used from one source.

The Agreement is silent regarding teacher assignments that require each student to make a photocopy of an article, rather than those that have the teacher make multiple photocopies, but a court would probably evaluate such an assignment as if the teacher herself had made the copies.

Copyright Act infringement suits can involve actions for injunctive relief and/or damages. A copyright owner can elect to prove actual damages or can use the measure of statutory damages provided in the statute. However, once the copyright owner elects a measure of damages (either actual or statutory), that remedy is usually exclusive.[1025] Actual damages can be recovered for lost profits and lost royalties.[1026] The range of statutory damages depends on the willfulness of the violation. Damages for infringements that are not willful range from a minimum of $500 to a maximum of $20,000

[1025] *Basic Books*, 758 F. Supp. at 1543.

[1026] *See* Applied Innovations v. Regents of Univ. of Minn., 876 F.2d 626, 637 (8th Cir. 1989) (damages of $226,598 awarded to licensee for lost profits and $162,161 to copyright owner for lost royalties).

for each violation.[1027] Awards for willful violations can be as high as $100,000 for each violation.[1028] However, in the case of copyright violations where the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," the court in its discretion may reduce the award of statutory damages to a sum not less than $200 for each violation.[1029] But for an agent or employee of an educational institution acting in the scope of his or her employment who "believed and had reasonable grounds for believing that his or her use of copyrighted work was fair use," the court "shall remit statutory damages."[1030]

Immigration and Reform Control Act (IRCA)

Enactment of the IRCA[1031] has had the effect of making all employers part of the Immigration and Naturalization Service (INS) process by requiring all employers within three business days of hire to establish through examination of appropriate documents both the identity and the work authorization of the employee.[1032] Documents which establish both identity and work authorization are:

(1) United States passport;

(2) Certificate of United States citizenship (INS Form N-560);

(3) Certificate of naturalization (INS Form N-550);

(4) Unexpired foreign passport if the passport reads "processed for I-551" or has form I-94 attached bearing the same name as the employment authorization stamp and has not yet expired;

(5) Alien Registration Card (Form I-551) containing bearer's photograph;

(6) Temporary Resident Card (INS Form I-688) or Employment Authorization Card (INS Form I-688A) containing bearer's photograph.[1033]

If an applicant or new hire does not have documentation from one of the above categories then separate documentation will be required for identity and work authorization. The following documents establish identity of the individual only:[1034]

[1027] 17 U.S.C. § 504(c)(1).

[1028] 17 U.S.C. § 504(c)(2). *See Basic Books*, 758 F. Supp. at 1543-45 (statutory damages set at $510,000 - $50,000 each for 9 infringements and $20,000 each for 3 infringements).

[1029] 17 U.S.C. § 504(c)(2).

[1030] 17 U.S.C. § 504(c)(1).

[1031] 8 U.S.C. §§ 1324, 1324a, 1324b (Supp. 1988).

[1032] 8 U.S.C. §§ 3124, 1324a, 1324b.

[1033] 8 U.S.C. § 1324a(b)(1)(B).

[1034] 8 U.S.C. § 1324a(b)(1)(D).

(1) state driver's license with a photograph;

(2) state-issued identification card with a photograph for individuals without driver's licenses or individuals in states without photographs on driver's licenses.

The following documents evidence employment authorization only:[1035]

(1) social security account number card as long as the card does not state on its face that the individual is not authorized for employment;

(2) certificate of birth in the United States issued by a state;

(3) certificate of birth issued by Department of State (Form FS-545);

(4) certificate of birth abroad issued by Department of State (Form DS-1350).

Although not specifically mentioned, a current I-20 form for full-time foreign students would be acceptable employment authorization for on-campus employment.

The above information is part of the documentation required for a new employee in completing the employment verification form called an I-9. The I-9, along with copies of verification documents, must be retained at least three years after the hire, or one year after discharge, whichever is longer.[1036] The I-9 forms are subject to inspection by INS or Department of Labor agents upon no more than three days notice without having to secure a subpoena or warrant.[1037] If confidentiality of employee records is at issue under state law, then the employer would be advised to keep all I-9 forms in a location separate from personnel files.[1038] Since I-9 forms have no statutory value beyond the maximum retention date, there would be nothing wrong with educational institutions periodically destroying I-9 forms no longer required to be retained. Penalties for failure to comply with IRCA include fines of up to $3,000 and six months imprisonment for each violation.[1039]

The IRCA also addresses problems attendant to student reception of Title IV funds.[1040] To be eligible for Title IV funds, each student must

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[1035] 8 U.S.C. § 1324a(b)(1)(C).

[1036] 8 U.S.C. § 1324a(b)(3).

[1037] *Id.*

[1038] IRCA permits the copying of any identity or authorization documents for purposes of complying with the statute, notwithstanding any law to the contrary which prohibits such copying. 8 U.S.C. § 1324a(b)(4).

[1039] 8 U.S.C. § 1324a(f)(1).

[1040] See 20 U.S.C. §§ 1070-1091.

declare under penalty of perjury and in writing to the institution whether he or she is a United States citizen, and if not, whether he or she is in an immigrant status that does not make him or her ineligible for grants, loans, or work assistance under Title IV. The following procedures are mandated:

(1) a student, not a United States citizen or a national of the United States, must present to the institution "alien registration documentation or other proof of immigration from the Immigration and Naturalization Service that contains the individual's alien admission number or alien file number (or numbers if the individual has more than one number)"[1041]

(2) the institution must verify with INS the individual's immigration status;[1042]

(3) where documentation under (1) is not presented or, if presented, has not been verified under (2) the student shall have a "reasonable opportunity to submit to the institution evidence indicating satisfactory immigration status" and until such a reasonable opportunity is provided, the student's eligibility for Title IV funds cannot be delayed, denied, reduced or terminated;[1043]

(4) if the institution receives documentation which it determines to constitute reasonable evidence of employment status [other than the documentation in (1)], photostat copies must be sent to INS for verification and, pending verification, the student's Title IV eligibility cannot be delayed, denied, reduced, or terminated;[1044]

(5) where the institution determines that a student is not in a satisfactory immigration status, the institution must deny eligibility or terminate the student's assistance and make available a statutory fair hearing process.[1045]

Where an alien student has improperly received Title IV money, the educational institution is protected from imposition of penalty by the Secretary of Education if the institution relied on INS verification of eligibility, was

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[1041] 20 U.S.C. § 1091(c)(2)(A).
[1042] 20 U.S.C. § 1091 (c)(3).
[1043] 20 U.S.C. § 1091 (c)(4)(A).
[1044] 20 U.S.C. § 1081 (c)(4)(B).
[1045] 20 U.S.C. § 1091 (c)(5) and (6). *See* Taka v. Immigration and Naturalization Serv., 828 F. Supp. 362, 365 (E.D. Pa. 1993) (Temple University could not be liable to student whose federal financial aid had been canceled because student could not prove she was " citizen or national of the United States, a permanent-resident of the United States, in the United States for other than a temporary purpose. . . . Temple University cannot be liable to plaintiff for following the eligibility requirements mandated by Congress." *See also* 34 C.F.R. § 668.7.

waiting for student documentation or INS verification, or was in the process of conducting a fair hearing.[1046] In the case of a guaranteed student loan, the guaranty is not voided or payments nullified if made prior to prompt notification by the educational institution of ineligibility to the entity making the loan.[1047] The purpose of these Title IV provisions appears to be standardization among all forms of student assistance and the establishment of more detailed requirements to prevent the award of aid to nonqualified aliens.

The IRCA has added a new section to the immigration statute prohibiting discrimination based on national origin or citizenship status. Employers of more than three employees are prohibited from discriminating in hiring or discharge of employees because of an individual's national origin or because the applicant is a United States citizen or intending to become a citizen.[1048] An "intending citizen" categorization applies to aliens admitted for permanent residence or as a refugee, and those granted asylum or having completed a declaration of intention to become a citizen. However, aliens must satisfy certain time limits for receiving naturalization or they will lose the statute's protection.[1049]

Bankruptcy Code and Student Debts

In an era of rising consumer debt, most nonpublic schools can reasonably anticipate that parents or students will seek to adjust their indebtedness by filing a petition for bankruptcy. Debtors have a choice of three kinds of bankruptcy: Chapter 7 in which nonexempt property is liquidated, proceeds are distributed among the creditors, and unpaid debts are discharged;[1050] Chapter 11 in which the debtor's financial affairs are reorganized under a court-approved plan;[1051] and Chapter 13 in which debtors have regular income, a portion of which is devoted to paying off debts.[1052]

Educational institutions will normally be the objects of Chapters 7 and 13 petitions in bankruptcy, and as unsecured creditors,[1053] schools can expect that their debts will have a low priority in payment. Unless an institution files appropriate and timely objections (an adversary proceeding against the debtor),[1054] it will be bound by the debt discharge under Chapter 13. Much

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[1046] 20 U.S.C. § 1091 (d).
[1047] 20 U.S.C. § 1981 (e).
[1048] 8 U.S.C. § 1324b.
[1049] 8 U.S.C. § 1324b (a)(3).
[1050] 11 U.S.C. § 523.
[1051] 11 U.S.C. § 1129.
[1052] 11 U.S.C. § 1324. Debts not covered by the plan will be discharged by the court. 11 U.S.C. § 1328.
[1053] The bankruptcy court must determine in a chapter 13 confirmation plan hearing whether the value, as of the effective date of the plan, of property to be distributed under the plan on account of each unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title.
11 U.S.C. § 1324 (a)(4). *See In re* Safka, 18 B.R. 986 (Bkrtcy. D. Vt. 1982).
[1054] *See In re* Love, 577 F.2d 344 (5th Cir. 1978).

of bankruptcy litigation involving educational institutions revolves around whether denial of discharge under Chapter 7 would represent "undue hardship on the debtor"[1055] and whether a Chapter 13 plan makes a good faith effort to repay the unsecured creditors, which includes educational creditors.[1056]

Educational institutions (as creditors) are affected in the following ways under automatic stay provisions[1057] when a debtor to the institution files a bankruptcy petition listing as a debt his educational obligation:

(1) The institution is prohibited from taking any action to recover. These automatic stay provisions tend to be interpreted broadly; thus, even continued sending of bills to the debtor may be a basis for a contempt summons, as harassing the debtor or as seeking to acquire an unfair advantage in debt collection.

(2) Educational institutions are prohibited from recovering any discharged debts.[1058]

(3) Educational institutions cannot deny admission, readmission, or access to classes for a student whose debts to the institutions are included in a bankruptcy petition.[1059]

(4) Educational institutions cannot refuse to send official transcripts as requested by the debtor-student while a petition in a bankruptcy is pending or after discharge of a debt.[1060]

[1055] 11 U.S.C. § 523(a)(8)(B). *In re* Plotkin, 164 B.R. 623 (Bkrtcy. W.D. Ark. 1994) (even though student still in college; hardship demonstrated where student suffered from severe osteoporosis, scoliosis, anorexia and gall bladder tumors and where future financial resources would only be able support debtor and dependents at subsistence level); *In re* O'Brien, 165 B.R. 456 (Bkrtcy. W.D. Mo. 1994) (discharge appropriate where debtor diagnosed with chronic fatigue syndrome and currently unemployed with no employment for past 18 months); *In re* Price, 25 B.R. 256 (Bkrtcy. W.D. Mo. 1982); Matter of Powelson, 25 B.R. 274 (Bkrtcy. D. Neb. 1982) (hardship demonstrated by great dollar disparity between net income and debts); *In re* Norman, 25 B.R. 345 (Bkrtcy. S.C. Cal. 1982) (hardship demonstrated in discharging educational loans because college graduate could find only temporary or part-time work). *Contra In re* Bethune, 165 B.R. 258 (Bkrtcy. E.D. Ark. 1994) (discharge inappropriate where debtor's income for foreseeable future sufficient to support debtor and her dependents and to repay student loans); *In re* Albert, 25 B.R. 98 (Bkrtcy. N.D. Ohio 1982) (discharge denied where debtor's income was increasing and was expected to improve in the future).

[1056] Wright State Univ. v. Novak, 25 B.R. 459 (Bkrtcy. S.C. Ohio 1982) (chapter 13 plan denied where debtor proposed paying less than 1% of $2200 debt over 36 months); *In re* Miller, 24 B.R. 786 (Bkrtcy. E.D. Pa. 1982) (chapter 13 plan denied where it proposed paying only 9% of debtor's unsecured claims, 69% of which consisted of outstanding student loans).

[1057] 11 U.S.C. §§ 362(a)(6) and 1301 (the bankruptcy code specifically provides an automatic stay of action against any debtor from the moment of filing the bankruptcy petition).

[1058] 11 U.S.C. § 524(a)(2).

[1059] *In re* Parkman, 27 B.R. 460 (Bkrptcy. N.D. Ill. 1983); *In re* Lanford, 10 B.R. 132 (Bkrptcy. D. Minn. 1981); In re Ware, 9 B.R. 24 (Bkrtcy. W.D. Mo. 1981).

[1060] Parraway v. Andrews Univ., 50 B.R. 315 (W.D. Mich. 1984); *In re* Lanford, *supra* note 1059; Handsomeev. Rutgers Univ., 445 F. Supp. 1362 (D.N.J. 1978).

Family Educational Rights and Privacy Act (FERPA)

All nonpublic educational institutions receiving funds distributed by the United States Department of Education must comply with the requirements of FERPA. However, generally only nonpublic higher education institutions will be subject to FERPA since the most common Department of Education funds are those under Title IV (e.g., Pell, GSL).

FERPA has two important functions: access by students to their own educational records, and control of access by others to student records. The key concept is "education records." "Education records" are records that are:

(1) Directly related to a student; and are

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.[1061]

Excluded from the definition of "education records" are records that meet the requirements of: the student as an employee of the educational institution;[1062] medical records;[1063] and law enforcement records.[1064] A record means "any information recorded in any way, including, but not limited to, handwriting, print, film, microfilm, and microfiche."[1065]

Disclosure of education record information, either to the student or to someone else, means "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."[1066] The important concept of "personally identifiable information" involves protecting educational information concerning a student (such as the posting of grades) by prohibiting identification with a particular student with such items as the following: the student's name; the name of the student's parent or other family member; the address of the student or student's family; a personal identifier, such as the student's social security number or student number; a list of personal characteristics that would identify the student; or other information that would make the student's identity easily traceable.[1067] However, in order to facilitate the nor-

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[1061] 34 C.F.R. § 99.3.
[1062] 34 C.F.R. § 99.3 (b)(3).
[1063] 34 C.F.R. § 99.3 (b)(5).
[1064] 34 C.F.R. § 99.3 (b)(2).
[1065] 34 C.F.R. § 99.3.
[1066] 34 C.F.R. § 99.3.
[1067] 34 C.F.R. § 99.3.

mal business of the educational institution that could otherwise be restricted if permission had to be secured from each student for every publication of information concerning students, a separate classification called "directory information" has been created. As long as the institution notifies the student each year as to the categories included within "directory information,"[1068] permission need not be secured from students to reveal the information, provided a student has not notified the institution that certain kinds of directory information are not to be revealed without prior permission.[1069]

The FERPA provides a process by which a student can challenge the content of an education record[1070] and also identifies a number of conditions under which an institution can reveal personally identifiable information without securing student consent, the most important of which are disclosures in connection with application for financial aid, disclosures to comply with a court order or subpoena, and disclosures pursuant to an accreditation review.[1071] An educational institution must comply with a request for education records within forty-five days and cannot destroy records once a request has been made.[1072] The institution can charge a fee for duplication of the requested records unless "the imposition of a fee prevents [an] . . . eligible student from exercising the right to inspect and review [his/her] education records . . . ."[1073] When personally identifiable information has been disclosed, the party to whom the information has been disclosed cannot then disclose the information to any other party without first securing the student's consent.[1074]

Enforcement of the FERPA is the responsibility of the Family Policy Compliance Office of the Department of Education.[1075] The FERPA does not permit a private cause of action,[1076] but a claim under section 1983 is possible.[1077] For most nonpublic educational institutions, because of the absence of "state action," enforcement will mean dealing with the federal government enforcement agency but not with disgruntled students in court.

[1068] 34 C.F.R. § 99.3. Directory information can include "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency attended." 34 C.F.R. § 99.6 (a)(6) requires that the institution specify the kinds of information considered to be directory information.

[1069] 34 C.F.R. § 99.37.

[1070] 34 C.F.R. § 99.21.

[1071] 34 C.F.R. § 99.31.

[1072] 34 C.F.R. § 99.10.

[1073] 34 C.F.R. § 99.11.

[1074] 34 C.F.R. § 99.33.

[1075] 34 C.F.R. § 99.60.

[1076] Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993); Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991).

[1077] Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992).

Even those nonpublic schools not subject to the requirements of the FERPA should give serious thought to meeting the spirit, if not the letter, of the statute. Providing access to student records by students, or their parents (where students are elementary or secondary age), is a good way of making certain that records do not contain inaccurate or irrelevant material. There seems to be no justification for maintaining information in student records that is not accurate, especially if the information as revealed to others could be harmful to the student. Student files need to be regularly reviewed, and even information that might have been useful at one time may cease to be relevant as the student progresses through school. Anecdotal comments about a student's problem behavior in sixth grade may not seem particularly relevant when the student has demonstrated good conduct in high school and is ready to graduate. Release of student information pursuant to the standards in the FERPA may be the best protection for a nonpublic school against charges of improper access by inappropriate persons to the student's records. Treating information in student records as the sole property of the school, to be released only at the discretion of school officials, is a dangerous practice that may result in the nonpublic school and its officials facing an invasion of privacy or intentional infliction of emotional distress action, especially where the information released is inaccurate. Fortunately, virtually all nonpublic students, regardless of how unruly they may have seemed to have been during their school days, tend to grow into mature and responsible citizens. Nonpublic schools can little afford to appear to demonstrate a spirit of vindictiveness by denying student access to information that may be inaccurate or irrelevant. At the very least, students should be permitted to submit responses to challenged information in their files, at which point school officials may want to rethink whether maintaining the information is really necessary.

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